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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1888.**

No. 1446.

CHAE CHAN PING, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

**FILED DECEMBER 1, 1888.**

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JUDD & DETWEILER, PRINTERS, WASHINGTON, DECEMBER 4, 1888.

1 In the Circuit Court of the United States, Northern District of California.

In the Matter of CHAE CHAN PING on *Habeas Corpus*.

To the hon. judge of the circuit court of the United States, northern district of California:

The petition of Jaia Mon Tong respectfully shows—

That Chae Chan Ping is unlawfully imprisoned, detained, confined, and restrained of his liberty by Captain Walker, master of the steamship Belgic, in the city and county of San Francisco, State of California, northern district of California.

That said imprisonment, detention, confinement, and restraint are illegal, and the illegality thereof consits in this, to wit:

That it is claimed by said Captain Walker that Chae Chan Ping is a subject of the Emperor of China and must and cannot be allowed to land under the provisions of the act of Congress of May 6th, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," and an act amendatory thereof and supplemental thereto, approved July 5th, 1884, and October, 1st, 1888.

2 That said Chae Chan Ping does not come within the restrictions of said act, but, on the contrary, your petitioner alleges that said Chae Chan Ping is the owner and holder of a custom-house return certificate, which was duly and regularly issued and delivered to him under the provisions of section 4 of the act of May 6, 1882; that at the time of the passage of the act of October 1st, 1888, the said Chae Chan Ping was on the high seas, having departed from Hong Kong on or about September 7th, 1888, en route for the United States, and had no opportunity of receiving notice of the passage of said act of October 1st, 1888, and did not receive notice thereof until his arrival in the port of San Francisco.

That your petitioner makes this petition on behalf of said Chae Chan Ping.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, direct- to the said Captain Walker, master of the said steamship, commanding him to have the body of said Chae Chan Ping before your honor, at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of his detention and said writ, and that he may be restored to his liberty.

3 Dated on the 10 day of October, 1888.

JAIA MON TONG, *Petitioner*.

UNITED STATES OF AMERICA.

STATE OF CALIFORNIA,
*City and County of San Francisco,* } *ss:*
*Northern District of California,*

Jaia Mon Tong, being duly sworn, says that he is the petitioner above named, and that he has heard read the foregoing petition and

knows the contents thereof, and that the same is true of his own knowledge.

JAIA MON TONG.

Sworn to before me this 10 day of October, 1888.

JOHN P. POOLE,
*Notary Public.*

Let the writ issue in pursuance of the prayer of the petition, returnable before the United States circuit court at 11 o'clock a. m., on Friday, Oct. 12, 1888.

LORENZO SAWYER,
— *Circuit Court.*

(Endorsed:) Petition for writ. Filed Oct. 11, 1888. L. S. B. Sawyer, clerk.

4 In the Circuit Court of the United States, Northern District of California.

In the Matter of CHAE CHAN PING on *Habeas Corpus.*

The President of the United States of America to Captain Walker master of the steamship Belgic, Greeting:

You are hereby commanded that you have the body of Chae Chan Ping, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the honorable the circuit court of the United States for the northern district of California, at the court-room of said court, in the city and county of San Francisco, California, on or before the 12 day of October, 1888, at 11 o'clock a. m., to do and receive what shall then and there be considered in the premises; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of October, A. D. 1888.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By —— ——, *Deputy Clerk.*

5 (Endorsed:) No. 10100. Circuit court of the United States, northern district of California. In the matter of Chae Chan Ping on *habeas corpus.* S. S. ticket No. —. Marshal's return of service of writ of *habeas corpus.* Filed on return this 11th day of October, 1888. L. S. B. Sawyer, clerk, by —— ——, deputy clerk.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the northern district of California, do hereby certify the foregoing to be a true copy of the writ of *habeas corpus* issued in the within-entitled matter.

Attest my hand and seal of said circuit court this 11th day of October, A. D. 1888.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By —— ——, *Deputy Clerk.*

I hereby certify that on the 11 day of Oct., 1888, I received the writ of which the within is a copy, and that on the 11 day of Oct., 1888, at San Francisco, in this district, I personally served the said writ by delivering to and leaving the same with Capt. Walker, master S. S. Belgic.

Dated San Francisco, Cal., Oct. 11, 1888.

J. C. FRANKS,
*U. S. Marshal,*
By W. W. PRESBURY,
*Deputy Marshal.*

6 In the Circuit Court of the United States, Northern District of California.

In the Matter of CHAE CHAN PING on *Habeas Corpus.*

The President of the United States of America to Captain Walker, master of the steamship Belgic, Greeting:

You are hereby commanded that you have the body of Chae Chan Ping, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name he shall be called or charged, before the honorable the circuit court of the United States for the northern district of California, at the court-room of said court, in the city and county of San Francisco, California, on or before the 12th day of October, 1888, at 11 o'clock a. m., to do and receive what shall then and there be considered in the premises; and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of October, A. D. 1888.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By —— ——, *Deputy Clerk.*

7 (Endorsed:) No. 10100. Circuit court of the United States, northern district of California. In the matter of Chae Chan Ping, on *habeas corpus.* S. S. ticket No. —. Writ of *habeas corpus* and return thereto. Filed on return this 12th day of October, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

In obedience to the within writ I hereby produce the body of Chae Chan Ping, as within directed, and return that I hold — in my custody, by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Chinese restriction act.

Steamship Belgic, San Francisco, Oct. 12th, 1888.

G. WRIGHT, *Captain.*

8 United States Circuit Court, Ninth Circuit, Northern District of California.

*In Re* CHAE CHAN PING on *Habeas Corpus*. No. 10100.

To the Honorable Lorenzo Sawyer, judge:

And now comes John T. Carey, United States attorney for the northern district of California, and asks for leave to intervene for and — behalf of the United States in the matter of the application made on behalf of the person first above mentioned for a writ of *habeas corpus*, and respectfully makes opposition to the said writ, and for grounds of intervention states as follows: That, as he is informed and believes, the said person in whose behalf said application was made has been and now is lawfully detained by the master of the steamship Belgic, now in the port of San Francisco, northern district of California, in compliance with the provisions of an act of Congress of the United States, entitled "An act to execute certain treaty stipulations relating to Chinese," approved May 6th, 1882, and the act amendatory thereof, approved July 5th, 1884, and
9 an act supplementary to said first-mentioned act, approved Oct. 1st, 1888, for the following reasons:

First. That the said person in whose behalf said application was made is, by race, language, color, dress, and occupation, a Chinese laborer, who had, prior to October first, A. D. 1888, been a resident within the United States, and who had prior to the passage of said act of Congress approved October first, 1888, departed therefrom and had not returned to the United States before the passage of said act of Congress last mentioned, and did not return to the United States until the 7th day of October, 1888.

Second. That the custom-house return certificate, alleged to have been regularly and duly issued and delivered to the said Chae Chan Ping under the provisions of section 4 of the act of Congress approved May 6th, 1882, and of which said Chae Chan Ping is alleged now to be the holder and owner, and upon which said Chae Chan Ping claims the right to land, is, under and by provisions of said act of Congress approved October first, 1888, declared null and void and of no effect.

Third. Intervener denies, upon information and belief, that
10 the said Chae Chan Ping, in whose behalf said application was made, is entitled to land in the United States, as is alleged in said application or otherwise.

Fourth. That the said Chae Chan Ping is not a prisoner in jail nor in custody under or by color of the authority of the United States nor committed for trial before any court of the United States, nor is he in custody for an act done or committed in pursuance of a law of the United States nor of an order, process, or decree of the United States court or judge thereof, nor is he in custody in violation of the Constitution or of any law or treaty of the United States nor being a subject or citizen of a foreign state and domiciled in the United States, nor is he in custody for an act done or committed under any alleged right, title, authority, privilege, protection, or ex-

emption claimed under the commission or order or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations, nor is it necessary to bring the said Chae Chan Ping into court to testify.

Fifth. That respondent, Captain Walker, master of the steamship Belgic, with the said Chae Chan Ping as a passenger
11 thereon from Hong Kong, arrived at the port of San Francisco, California, on the 7th day of October, A. D. 1888, and now detains him, the said Chae Chan Ping, on board said steamship Belgic, by directions of the collector of said port, upon the ground that said Chae Chan Ping is not entitled to land in the United States, he being a Chinese laborer returning to the United States after the passage of the act of Congress entitled "An act a supplement to an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved the 6th day of May, 1882;" which said act was approved on the first day of October, A. D. 1888.

Wherefore intervener prays that the writ in said application may be denied and dismissed, and said Chae Chan Ping remanded to the custody from whence he came and ordered to depart the country, and that such other order may be made as may seem meet in the premises.

JOHN T. CAREY,
*United States Att'y.*

(Endorsed:) Intervention of United States. Filed Oct. 12, 1888. L. S. B. Sawyer, clerk.

THE UNITED STATES OF AMERICA:

[Vignette.]

CUSTOM-HOUSE, PORT OF SAN FRANCISCO.

Certificate furnished to the following-named Chinese laborer, departing from the United States, for production to a customs officer on his return.

Description.

| Name. | | | Age. | Height. | | Complexion. | Color of eyes. | Physical marks or peculiarities and facts of identification. |
|---|---|---|---|---|---|---|---|---|
| Individual. | Family. | Tribal. | | Feet. | Inches. | | | |
| Ping Chan Chae | | | 34 | 5 | 3⅝ | Bro. | Bro. | Small mole on upper lip & right corner of mouth. |

| Occupation. | | | Last place of residence. |
|---|---|---|---|
| Kind. | When followed. | Where followed. | |
| Lab. | 1875–1887 | San Francisco, Cal. | San Francisco, Cal. |

I certify that the Chinese laborer to whom this certificate is issued is entitled, in accordance with the provisions of the act of Congress approved May 6, 1882, as amended by the act of July 5, 1884, to return to and re-enter the United States upon producing and delivering this certificate to the collector of customs of the district at which he shall seek to re-enter.

Witness my hand and official seal this 2 day of Jun-, 1887.

[SEAL.]

H. H. SCOTT, *Deputy Collector of Customs.*

May be signed by a deputy collector.

(To knowingly and falsely alter this certificate or to substitute any name for that written herein, to forge or knowingly utter and forged or fraudulent certificate, or to falsely personate any person named herein is to be guilty of a misdemeanor, punishable by fine and imprisonment.)

(The certificate is furnished without charge.)

13 *Findings.*

In the Circuit Court of the United States for the Northern District of California.

*In Re* CHAE CHAN PING on *Habeas Corpus.*

The petitioner is a Chinese laborer, a subject of the Empire of China. He resided in the State of California and followed the occupation of laborer at San Francisco, California, from 1875 till June 2, 1887. On the last-named day he departed for China on the steamship Gaelic, having in his possession the certificate duly issued to him by the collector of customs of the port of San Francisco in pursuance of the provisions of section 4 of the restriction act of 1882, as amended by the act of 1884. He sailed from Hong Kong China, on his return to California on the steamship Belgic on September 7, 1888.

On October 1, 1888, he was on the high seas en route for California, and until his arrival at the port of San Francisco, at the date aforesaid, he had no notice or means of knowledge of the
14 passage by Congress of the restriction act, which became a law on October 1, 1888.

On his arrival at San Francisco he presented to the customs officers his certificate so duly issued to him as aforesaid on his departure under section 4 of the restriction act as amended in 1884—which certificate is annexed hereto as Exhibit A—and demanded permission to land. The collector refused to permit him to land, solely on the ground that under the act of Congress approved October 1st, 1888, supplemental to the restriction acts of 1882 and 1884, the certificate was annulled and made void and his right to land abrogated, and that the petitioner was thereby forbidden to again enter the United States. Upon these facts appearing in the petition the writ of *habeas corpus* was issued and the petitioner produced in obedience to its commands. The facts herein found are conceded by both parties.

*Conclusions of Law.*

1. The petitioner is not entitled to enter the United States.
2. He is not unlawfully restrained of his liberty.
15 3. That he must be remanded to the custody of the master of the steamship whence he was taken.

Let judgment be entered accordingly.

LORENZO SAWYER,
*Circuit Judge.*
OGDEN HOFFMAN,
*Dist. Judge.*

(Endorsed:) Findings. Filed October 15, 1888. L. S. B. Sawyer, clerk.

16 *Syllabus by the Court.*

Circuit Court, N. D. California. October 15, 1888.

*In Re* CHAE CHAN PING on *Habeas Corpus.*

1. Chinese—Exclusion act of 1888—Construction.—The Chinese exclusion act, approved October 1, 1888, took effect from its passage, and it applies to all Chinese laborers who had departed from the United States, and had not in fact returned and arrived in the United States before the passage of the act.
2. Same—Constitutional law—Ex *post facto* law.—The Chinese exclusion act of October 1, 1888, is a valid act. It is not unconstitutional as being a law divesting rights fully vested under the several treaties between the United States and China, and the prior restriction acts of 1882 and 1884, to which it is supplemental, or as being an *ex post facto* law.
3. Same—Obligation of contracts—Certificates under act of 1882.—Certificates issued under the restriction acts of 1882 and 1884 are not contracts between the United States and the Chinese laborers, to whom they are respectively issued. They are issued as evidence to identify parties entitled to privileges provided for in our treaties with China, and acts passed to give them effect.
4. Same—Treaties—Acts of Congress—Repeal.—With respect to matters proper for congressional legislation, treaties and acts of Congress stand upon an equal footing as parts of the supreme law of the land, and a later inconsistent provision in either repeals the earlier in the other.

The petitioner is a Chinese laborer, a subject of the Empire of China. He resided in the State of California, and followed the occupation of laborer, at San Francisco, Cal., from 1885 until June 2, 1887. On the last-named day he departed from San Francisco for China, on the steamship Gaelic, having in his possession the certificate duly issued to him by the collector of customs of the port of San Francisco, in pursuance of the provisions of section 4 of the restriction act of 1882, as amended by the act of 1884. He sailed from Hong Kong, China, on his return to California, on the steamship Belgic, on September 7, 1888, and arrived at the port of San Francisco on October 7, 1888. On October 1, 1888, he was on the high seas, en route for California; and until his arrival at the port of San Francisco, at the date aforesaid, he had no notice, or means of knowledge, of the passage by Congress of the exclusion act, which became a law on October 1, 1888. On his arrival at San Francisco, he presented to the customs officers his certificate so duly issued to him, as aforesaid, on his departure, under section 4 of the restriction act, as amended in 1884, and demanded permission to land. The collector refused to permit him to land, solely on the ground that, under the act of Congress approved October 1, 1888, supplemental to the restriction acts of 1882 and 1884, the certificate was annulled and made void, and his right to land abrogated, and that the petitioner was thereby forbidden to again enter the United States. Upon these

facts appearing in the petition the writ of *habeas corpus* was issued, and the petitioner produced in obedience to its commands.

T. D. Riordan, Lyman I. Mowrey, and A. H. Ricketts, for petitioner.

J. T. Carey, U. S. att'y, *contra.*

Before Sawyer, circuit judge, and Hoffman, district judge.

SAWYER, *J.* (after stating the facts as above):

The first question arising on the facts stated, is, Is the petitioner embraced within the provisions of the act of Congress approved October 1, 1888, forbidding the coming of Chinese laborers into the United States? Upon this point, it seems to us, there can be no doubt. The language of section 1 of the act, so far as it affects the petitioner, is, "that, from and after the passage of this act, it shall be unlawful for any Chinese laborer, who shall at any time heretofore have been * * * a resident within the United States, and who shall have departed * * * therefrom, and shall not have returned before the passage of this act, * * * to return to * * * the United States." And of section 2, "that no certificate of identification provided for in the fourth and fifth sections of the acts to which this is supplemental shall hereafter be issued, and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer, claiming admission by virtue thereof, shall not be permitted to enter the United States." This language is clear and exact, and is susceptible of but one construction. The act, in express and unmistakable terms, fixes the date from which it shall begin to operate, and that date is "from and after the passage of this act; that is to say, October 1, 1888, when it became a law. In equally clear and explicit terms it provides upon whom it shall operate, and that is "any Chinese laborer, who shall at any time heretofore have been * * * a resident within the United States, and shall have departed, * * * and shall not have returned before the passage of this act,"—not every Chinese laborer who shall have departed and not yet have started on his return,

but every Chinese laborer who shall have departed, and shall not
17 in fact "have returned before the passage of this act." There is no possible ground under this specific language of inferring an exception in favor of those who were on the high seas at the date of the passage of the act. The act, by express provision, operates upon all within its terms from the moment it was approved by the President and became a law. Now, the petitioner had been a resident within the United States, and he had departed therefrom with his certificate duly issued in pursuance of section 4 of the prior restriction act, as amended, and he had not returned "before the passage of this act." He did not, in fact, return till several days after its passage. There cannot be any doubt that the act operates upon him, and, this being so, under section 1 it is unlawful for him to return to the United States, and by section 2 his certificate is declared to be "void and of no effect," and it is provided that he "shall not be permitted to enter the United States." To admit him, therefore,

would be to directly violate the unmistakable provision of the statute. But it is said, it would be a great hardship, and a violation of the faith of the nation to, now, shut out those who were already on the way, relying upon the treaties and law as they were when they left China upon their return voyage without any means of notice of the change until their arrival. Be it so. That is no concern of the courts, acting judicially, except so far as it bears upon the construction of an ambiguous statute. The responsibility of this hardship is not upon the courts. They do not and cannot make the law. That was a consideration to be addressed to Congress and the President. It is the duty of the courts to administer, and enforce the law as they find it. Hardship affords no justification, or authority, for the courts to take out of the provisions of the statute by forced construction, matters that Congress clearly, and unmistakably, intended should not be excepted. That Congress intended no such exceptions is not only apparent from the clear and unambiguous language used, but from its own action during the course of the passage of the bill through Congress, and by the subsequent action of both the Executive and Congress. One of the grounds of a motion to reconsider in the Senate before final action on the bill, was, that, there might be an opportunity to provide an exception of this very class of cases, but that body refused to reconsider for that purpose. So the President, in his message accompanying his approval, noticed the comprehensive terms of the act, and suggested the immediate passage of another act, or joint resolution making this very exception; but Congress declined to act upon the suggestion. It is evident, therefore, both from the language of the act, and the action of the President and Congress, that no such exception was intended. It would be a gross assumption of authority for the court to now ingraft the exception, so repudiated, upon the act.

It is next urged with great zeal by petitioner's counsel that if the petitioner is within the scope of the act, then the act is unconstitutional, and void—first, as divesting a right indefeasibly vested under the treaties and laws passed in pursuance thereof; secondly, as being an *ex post facto* law within the clause of the Constitution providing that Congress shall have no power to pass *ex post facto* laws. The certificate, it is urged, is a contract entered into between the United States and the petitioner in pursuance of the restriction act, which vests him with a right that cannot now be divested under the general principles of public justice, even though the constitutional provision against passing laws impairing the obligation of contracts is in terms only restrictive upon the States. We think this is not the correct view. There is no contract between the United States and individual Chinese laborers at all. The Chinese laborers obtain no rights under the acts of Congress beyond what is secured to them by the treaties. There is no consideration moving from them, individually or collectively, under the act of Congress, upon which a contract was founded. All the rights they have are derivative, merely, resting upon the stipulations of the treaty between the two governments, which are the contracting, and only contracting parties. Instead of enlarging their rights, the acts of Congress are re-

strictive in character, and the restrictions were adopted in pursuance of the agreement allowing such restriction in the last treaty. The certificates are mere instruments of evidence, issued to afford convenient proof of the identity of the party entitled to enjoy the privileges secured by tne treaties, and to prevent frauds, and they are so designated in the last act. The act, in fact, restricted the evidence upon which their rights and privileges could be established. Before the passage of the restriction acts Chinese laborers could be admitted on any evidence competent under the ordinary rules of evidence; now, by the act of 1884, they are limited to the particular certificate prescribed. It was not a contract in any proper sense, but only an instrument of evidence to establish the identity of the party already entitled to certain privileges under the contract, not between them and the United States, but between the two contracting governments. There was no mutual consideration, or discussion of the terms of a contract between the United States and Chinese laborers, who were affected by the restriction acts. There was no meeting of two minds on the terms of an agreement.

18 The Chinese laborers were not consulted at all in the matter. The restriction acts, and certificates provided for therein, are, simply, sovereign commands and prohibitions, to which the Chinese laborers affected were compelled to submit, willing or unwilling. To call these acts and certificates provided in pursuance thereof a contract would be an abuse of language. As between the two governments treaties are laws, and they confer rights and privileges as long as they are in force, and, doubtless. Some rights accrue and become indefeasibly vested by covenants or stipulations that have ceased to be executory and have become fully executed, as in the case of title to property acquired thereunder. But we do not regard the privilege of going and coming from one country to another as of this class of rights. The being here with a right of remaining is one thing, but voluntarily going away with a right at the time to return is quite another. The right of Congress to legislate in such manner as to control and repeal stipulations of treaties granting this latter class of rights was clearly recognized in Ah Lung's case, 9 Sawy., 308; 18 Fed. Rep., 28, decided by Mr. Justice Field, and concurred in by myself. Says the court:

"A treaty is in its nature a contract between two nations, and by writers on law is generally so treated, and not as having of itself the force of a legislative act. The Constitution of the United States, however, places both treaties and laws made in pursuance thereof in the same category, and declares them to be the supreme law of the land. It does not give to either a paramount authority over the other. So far as a treaty operates by its own force, without legislation, it is to be regarded by the courts as equivalent to the legislative act, but nothing further. If the subject to which it relates be one upon which Congress can also act, that body may modify its provisions, or supersede them entirely. The immigration of foreigners to the United States, and the conditions upon which they shall be permitted to remain are appropriate subjects of legislation, as well as of treaty stipulation. No treaty can deprive Con-

gress of its power in that respect. As said by Mr. Justice Curtis, in the case of Taylor *v.* Morton: 'Inasmuch as treaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President, while they continue unrepealed; and inasmuch as the power of repealing these municipal laws must reside somewhere, and nobody other than Congress possesses it, then legislative power is applicable to such laws whenever they relate to subjects which the Constitution has placed under that legislative power.' 2 Curt., 459. An act of Congress then, upon a subject within its legislative power, is as binding upon the courts as the treaty on the same subject. Both are binding except as the later one conflicts or interferes with the former. If the nation with whom we have made the treaty objects to the action of the legislative department, it may present its complaint to the executive department, and take such other measures as it may deem that justice to its own citizens or subjects require. The courts cannot heed such complaint, nor refuse to give effect to a law of Congress, however much it may seem to conflict with the stipulations of the treaty. Whether a treaty has been violated by our legislation so as to be the proper occasion of complaint by the foreign government is not a judicial question. To the courts it is simply a case of conflicting laws, the last modifying or superseding the earlier."

This same principle was stated by me again, in Ah Ping's Case, 11 Sawy., 20, 21, 23 Fed. Rep., 329. In the Head-Money Cases, 112 U. S., 598, 5 Sup. Ct. Rep., 247, the Supreme Court cites the case of Ah Lung, *supra*, upon the point stated in the passage quoted, and approves the doctrine stated, adding:

"It is very difficult to understand how any different doctrine can be sustained. A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If this fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that, 'this Constitution, and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of a private citizen or subject may be

determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the Government, by which the treaty is made, which gives it this superior sanctity. * * * In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal."

This doctrine was again repeated at the last term of the Supreme Court, with emphasis, in Whitney *v.* Robertson, 124 U. S. 193, 195, 8 Sup. Ct. Rep. 456. The court closes the decision with these conclusions:

19 "It follows, therefore, that when a law is clear in its provisions, its validity cannot be assailed in the courts for want of comformity to stipulations of a previous treaty not already executed. Considerations of that character belong to another department of the Government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will."

The Cherokee Tobacco Case, 11 Wall. 616, and U. S. *v.* McBratney, 104 U. S. 621, 622, establish the same doctrine. See, also, U. S. *v.* Benzon, 2 Cliff. 513, upon the question of vested rights. We are satisfied that, under the doctrine established by the cases cited, the act in question is valid in the respect stated in the first branch of the point under discussion.

In support of the proposition, that the act is an *ex post facto* law, and, therefore, unconstitutional, counsel for petitioner rely upon the cases of Cummings *v.* Missouri, 4 Wall. 277, and *Ex parte* Garland, *id.* 333. We were familiar with those cases, but we have examined them carefully, and are of opinion that they do not touch this case. We do not find any element of an *ex post facto* law in the act now in question. There is nothing in the nature of an offense in a Chinaman's departing from the country, and his departure is not made an offense; and there is nothing in the nature of punishment or of a penalty imposed for the act of having departed from this country, in providing, in the interest of the people of the United States, under a change of public policy, that he shall not return. There is simply a repeal by Congress of a prior law found in the stipulations of the treaty with China.

We have, heretofore, found it our duty, however unpleasant, at times, to maintain, fearlessly, and steadily, the rights of Chinese laborers under our treaties with China, and the acts of Congress passed to carry them out. That we have been right in law, is established by the fact that our decisions have been affirmed by the Supreme Court of the United States on every point of law and construction of the act that has been raised, or discussed before us in

the courts and taken to that tribunal for its consideration. That we have been right in fact, as well as in law, in the view we entertained of the intention of Congress, as expressed in the several restriction acts, is abundantly evidenced by the fact that at every session since our construction of the acts passed was made public in Ah Quan's Case, 10 Sawy. 223, 21 Fed. Rep. 182, more than four years ago, Congress has persistently refused to pass any law which conflicted with the stipulations of our treaties with China until the act now under consideration was hastily passed, after the Government had failed to secure the desired objects by further treaty stipulations without a violation of those already existing. As we faithfully enforced the laws, as we found them, when they were in favor of the Chinese laborers, we deem it, equally, our duty to enforce them in all their parts, now that they are unfavorable to them. In view of what has heretofore occurred with reference to the administration of our treaties and laws upon the subject under consideration, we deem it proper to express the hope, that, so long as we sit upon the judgment seat, we shall be endowed with sufficient courage and firmness to administer honestly, and faithfully, according to its true import, any valid law that Congress may, in its wisdom, see fit to enact upon this, or any other, subject. That is what the judicial department of this Government is established for, and when it ceases to perform its whole duty fearlessly and persistently by reason of popular clamor, or other improper outside influences, it will have ceased to perform its proper functions, and failed to answer the purposes of its creation. It is not the function of the courts to abrogate an unsatisfactory law by arbitrarily refusing to enforce it. The only proper mode of getting rid of such a law, is, for Congress to repeal or modify it. We entertain no doubt that the act in question is valid, and that the petitioner is expressly forbidden by its terms to enter the United States, and that it would be unlawful for him to do so. The result is that he is not unlawfully restrained of his liberty, and that he must be remanded; and it is so ordered.

Endorsed: Opinion. Read in open court October 15, 1888. L. S. B. Sawyer, clerk.

20 In the Circuit Court of the United States, Northern District of California.

In the Matter of CHAE CHAN PING on *Habeas Corpus*. No. 10100.

This matter having been regularly brought on for hearing before the court and the judge thereof, the United States attorney having appeared and intervened on behalf of the United States, and the same having been duly heard and submitted and due consideration thereon had, it is by the court now here considered—

That Chae Chan Ping, in whose behalf the writ of *habeas corpus* herein was sued out, was not at the date of the petition herein illegally restrained of his liberty, as therein alleged.

It is further adjudged and found that he came from China by the steamship Belgic, and is a Chinese person forbidden by law to land

within the United States, and has no right to be or remain therein.

It is therefore ordered that the said Chae Chan Ping be remanded by the United States marshal for the northern district of California to the custody whence he was taken, to wit, on board the said steamship, to the custody of Captain Walker, the master of said steamship, or, in case of a change of master, to the custody of the master thereof, whoever he may be at the time of this order of remand, or to place him in the hands and charge of any party on board said steamship for the time being representing the master or then in charge of said steamship in the absence of the master or for the time being exercising control or authority thereon; this order to be executed as to said steamship, whether still in port, not having departed therefrom, or having departed and returned since the proceedings herein were instituted; and in case said steamship has departed and not returned, or for any other reason the said Chae Chan Ping cannot be placed on said steamship, that the said marshal place him upon any other vessel available for the purpose, paying the necessary passage money, for the purpose of deporting him out of the United States and transporting him to the port whence he came; and, for the purpose of carrying this order into effect, it is further ordered that the said marshal take the said Chae Chan Ping into custody and him safely keep till said order shall be fully executed.

Entered this 15th day of October, 1888.

L. S. B. SAWYER, *Clerk.*

21 (Endorsed:) No. 10100. United States circuit court for the northern district of California. *In re* Chae Chan Ping on *habeas corpus.* Certified copy. Judgment of remand. Filed October 15th, 1888. L. S. B. Sawyer, clerk, by —— ——, deputy clerk. Entered in Judgment Register No. —, p. —.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the northern district of California, do hereby certify the foregoing to be a full, true, and correct copy of an original judgment of remand entered in said court in the within-entitled matter.

Attest my hand and seal of said circuit court this 15th day of October, A. D. 1888.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By —— ——, *Deputy Clerk.*

22 At a stated term, to wit, the July term, A. D. 1888, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 15th day of October, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Lorenzo Sawyer, circuit judge.

In the Matter of CHAE CHAN PING on *Habeas Corpus.* No. 10100.

This matter, heretofore heard and submitted to the court for consideration and decision, having been duly considered and the opin-

ion of the court having been read, it is ordered that the petitioner, Chae Chan Ping, be remanded to the custody whence he came and judgment entered herein accordingly.

On motion of T. D. Riordan, Esq., attorney for said petitioner, it is ordered that a stay of proceedings of ten days be, and the same hereby is, granted. On like motion it is ordered that an appeal to the Supreme Court of the United States from the judgment entered herein this day be, and the same hereby is, granted, and that a certified transcript of the record and all proceedings in the above-entitled matter be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the amount of the bond on appeal be fixed at three thousand dollars.

23 United States Circuit Court, Northern District of California.

In the Matter of CHAE CHAN PING on *Habeas Corpus*. No. 10100.

You will please take notice that the above-named Chae Chan Ping hereby appeals to the Supreme Court of the United States from the judgment and order of remand made and entered herein by said circuit court on the 15th day of October, A. D. 1888, and from the whole thereof.

Yours respectfully, THOS. D. RIORDAN,
*Att'y for Pet'n'r.*

October 15th, 1888.

To J. T. Carey, Esq., U. S. att'y, and to the clerk of said court.

(Endorsed:) Notice of appeal. Service hereof admitted this 15th day of October, 1888. John T. Carey, U. S. att'y. Filed October 15, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

24 UNITED STATES OF AMERICA, }
*Northern District of California,* } *ss:*

Be it remembered that on this 15 day of October, 1888, before the undersigned, a commissioner duly appointed by the circuit court of the United States, northern district of California, to take acknowledgment of bail and affidavits, etc., personally appeared Chae Chan Ping, as principal, and Sam Yuen, of the firm of Quong Lee & Co., No. 828 Dupont street, and Jay Chee, of the firm of Chy Lung & Co., No. 640 Sacramento street, as sureties, and acknowledged themselves to owe and to be indebted to the United States of America as follows—that is to say, in the sum of three thousand dollars each, to be levied of their goods and chattels, lands and tenements, and the United States rendered, if default be made, in the conditions following:

The conditions of this recognizance are such that whereas one Chae Chan Ping has been produced before the circuit court of the United States in and for the northern district of California upon a writ of *habeas corpus* duly sued out of said court upon petition, and has been duly admitted to bail by said court pending the hearing of

an appeal to the Supreme Court of the United States in the sum of three thousand dollars:

Now, therefore, if the said Chae Chan Ping shall personally appear before the said circuit court of the United States in and for the northern district of California, at the court-room thereof, at San Francisco, California, as he may from time to time be by said court required to appear, and render himself amenable to any and all lawful orders and process of said court or of said Supreme Court, and not depart the said court without leave first obtained, and abide by the final order of said court in said matter to be made and entered, and answer all costs in the premises, then this recognizance shall be void; otherwise to remain in full effectand virtue.

(Chinese Signature.)

CHAE CHAN PING. [SEAL.]
SAM YUEN. [SEAL.]
JAY CHEE. [SEAL.]

Acknowledged before me the day and year first above written.

F. D. MONCKTON,
*Commissioner U. S. Circuit Court,*
*Northern District of California.*

NORTHERN DISTRICT OF CALIFORNIA, *ss:*

Sam Yuen and Jay Chee, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of three thousand dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

SAM YUEN.
JAY CHEE.

Sworn to before me this 15th day of October, A. D. 1888.

F. D. MONCKTON,
*Commissioner U. S. Circuit Court,*
*Northern District of California.*

25 [Endorsed:] No. 10100. Circuit court of the United States, northern district of California. In the matter of Chae Chan Ping on *habeas corpus.* Bond to appear pending appeal, &c. Filed Oct. 15, 1888. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

I hereby certify that I personally know the sureties on the within bond; that I believe the persons signing are the persons described in and who purport to sign the bond, and that I believe them to be amply worth the penalty thereof, exclusive of property exempt from execution and over and above all just debts and liabilities.

THOS. D. RIORDAN,
*Attorney for Petitioner.*

Approved Oct. 15, 1888.

LORENZO SAWYER,
*Circuit Judge.*

26 U. S. OF AMERICA, } ss:
*City and County of San Francisco,* }

Sam Yuen, being sworn, says: I reside at 1116 Stockton street, & am a member of the firm of Quong Lee & Co., at 828 Dupont street. My interest in said firm is worth the sum of $8,000; also own an interest in the firm of Hop Sing & Co., at Honolulu; also have money on interest to the amount of $20,000.

SAM YUEN.

Sworn to before me this 15th day of October, 1888.

F. D. MONCKTON,
*Commissioner U. S. Circuit Court,*
*Northern District of California.*

Jay Chee, being sworn, says: I reside at 640 Sacramento St., & own property as follows: Interest in the firm of Chy Lung & Co., at 640 Sacramento St., worth $5,000; have $2,000 interest in Tie Hing Lung & Co., at 818 Dupont St.

JAY CHEE.

Sworn to before me this 15th day of Octo., 1888.

T. D. MONCKTON,
*Commissioner U. S. Circuit Court,*
*Northern District of California.*

27 In the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Northern District of California.

In the Matter of CHAE CHAN PING on *Habeas Corpus.* No. 10100.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify that the foregoing (26) twenty-six written and printed pages, numbered from 1 to 26, inclusive, are a full, true, and correct copy of the record and of the proceedings in the above and therein entitled matter, and that the same together constitute the transcript on appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 20th day of November, A. D. 1888.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

L. S. B. SAWYER,
*Clerk U. S. Circuit Court, Northern District of California.*

28 UNITED STATES OF AMERICA, *ss:*

To the United States of America and to John T. Carey, Esq., U. S. attorney for the northern district of California, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 15th day of October, A. D. 1888, pursuant to an order of the circuit court of the United States,

ninth circuit, northern district of California, made and entered on October 15th, 1888, allowing an appeal from the judgment and order of remand rendered and entered on said day in the matter of Chae Chan Ping on *habeas corpus*, to show cause, if any there be, why the errors in the said matter mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the said circuit court, this 15th day of October, A. D. 1888, and of the Independence of the United States the one hundred and thirteenth.

LORENZO SAWYER,
*Circuit Judge.*

29 [Endorsed:] No. 10100. In the Supreme Court of the United States. In the matter of Chae Chan Ping on *habeas corpus*. Citation. Service hereof admitted this 15th day of October, A. D. 1888. John T. Carey, U. S. attorney. Filed October 15th, 1888. L. S. B. Sawyer, clerk U. S. circuit court, nor. dist. Cal.

30 Supreme Court United States, of October Term, in the Year of Our Lord One Thousand Eight Hundred and Eighty-Eight.

CHAE CHAN PING, Appellant,
*vs.*
THE UNITED STATES, Respondent.

Afterwards, to wit, on this third Monday in October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Chae Chan Ping, appellant, by Thos. D. Riordan, his attorney, and says that in this record aforesaid there is a manifest error in this, to wit:

That the said circuit court, of the 9th judicial circuit, in and for the northern district of California erred in deciding—

1. That the appellant is not entitled to enter the United States.
2. That he is not unlawfully restrained of his liberty.
3. That he be remanded to the custody of the master of the steamship whence he was taken.

31 And the said Chae Chan Ping prays that the said judgment entered herein against him be reversed, annulled, and altogether held for nothing, and that he be restored to all things which he has lost by occasion of the said judgment.

THOS. D. RIORDAN,
*Attorney for Appellant.*

[Endorsed:] Supreme Court of the United States. Chae Chan Ping, appellant, *vs.* The United States, respondent. Assignment of errors. Thos. D. Riordan, attorney and counselor at law, 6 Montgomery avenue, San Francisco.

Endorsed on cover: N. California C. C. U. S. No. 1446. Chae Chan Ping, appellant, *vs.* The United States. Filed December 1, 1888.

Supreme Court, U. S.
FILED
MAR 28 1899
JAMES H. McKENNEY
CLERK

# SUPREME COURT OF THE UNITED STATES.

**No. 1445.**

CHAE CHAN PING,

*Appellant,*

*vs.*

THE UNITED STATES,

*Appellee.*

## BRIEF FOR APPELLANT.

JAMES C. CARTER,

*of Counsel for Appellant.*

ALBERT B. KING, PRINT., 19 LIBERTY ST., N. Y.

# SUPREME COURT OF THE UNITED STATES.

No. 1446.

CHAE CHAN PING,
Appellant,

*vs.*

THE UNITED STATES.

The following is designed to present in a brief compass the main propositions elaborated and illustrated in the more copious brief prepared by Mr. Hoadly.

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**First Point.**—It appears by the record that the appellant when brought before the court below in pursurance of the writ of *habeas corpus* was restrained of his liberty in not being allowed to land from the steamer "Belgic"—in other words that he was *imprisoned* upon that vessel. The judgment of the court was that he had no right to land, and was therefore not unlawfully restrained of his liberty. If he had such right, it

will not be denied that the judgment was erroneous and should be reversed.

**Second Point.**—Inasmuch as it did not appear to the court below that the petitioner was held under any sentence, judgment, writ or other judicial process of any court, it became instantly manifest that he was deprived of his liberty *without due process of law*, unless some other matter appeared showing that he was not entitled to the protection of the common constitutional safeguard to personal liberty.

1. It is, at least, in general true that whenever upon the hearing, upon a return to a writ of *habeus corpus* that any man is held a prisoner upon any other ground or pretence, than the command of some writ or other judicial process, order, or judgment, he must instantly be discharged. It is only by the authority of *law* manifested through the mandate of some *court* or *judicial* officer that one man can be held a prisoner by another.

2. There is no distinction in this respect, between citizens and the subjects of other nations. Liberty is the birthright and inalienable possession of all men, as *men*. For this proposition an American lawyer disdains to cite authority. Neither the fundamental law of the United States, nor of any one of the States, recognizes any such distinction.

**Third Point.**—The special matter which the judgment of the court below determined as sufficient to take the case of the appellant out of the operation of the principles above mentioned, was, that the appellant was a Chinese laborer who had been a resident of the United States, but who had departed therefrom, and was under the provisions of the Act of Congress, approved October 1st. 1888, forbidden to return to the United States. This matter was wholly insufficient to justify the detention of the appellant.

1. The inherent right of a sovereign power to prohibit, even in time of peace, the entry into its territories of the subjects of a foreign state will not be denied. But the United States, while a sovereign government, is yet one which can exercise only those powers of sovereignty which are enumerated in and delegated by the instrument which created it, and such other incidental powers as are necessary and proper in order to carry into execution those thus enumerated. That the power of prohibition above mentioned is one, in terms, delegated, will not be asserted. That it is necessary or proper in order to carry into execution some power expressly delegated may be asserted, but is by no means conceded. Such a proposition may well await the solemn determination of this court when some case arises which depends solely upon it. Its establishment is not neecessary in order to maintain the case of the appellant.

2. Whatever power Congress may have to prohibit

the immigration of other foreign citizens or subjects, it had none to prohibit the *return* to this country of the appellant. He had a *vested right* to return, which could not be taken from him by any exercise of mere *legislative* power.

(*a.*) That he had a lawful right to *be* in the United States when the writ issued cannot be denied. He had been a peaceable resident of California for twelve years preceding June 2d, 1887 (fol. 13). He had come here under a treaty between the United States and his own nation, which declared "the inherent and in- "alienable right of man to change his home "and allegiance, and also the mutual advan- "tage of the free migration and immigration "of their citizens and subjects respectively "from the one country to the other for pur- "poses of curiosity, of trade, or as *permanent* "*residence*" (Burlingame Treaty, Art. V.). He could not have been *ejected* from the United States by any mere legislation. However the power "to regulate commerce with "foreign nations" may authorize congressional legislation to prevent the *entry* of foreign subjects, no one, it is believed, will assert that any power is conferred upon Congress to command them to surrender any residence they may have acquired under such invitations and guaranties, and *depart* from the country. The "Alien Law" of 1798 has been feebly sustained as an exercise of lawful power; but that did not assert the right of compelling an alien *friend* to leave the country, and the only defense of it which has been allowed as plausible was that it was a

measure in preparation for *anticipated war*, and, therefore, an exercise of the war power.

(*b.*) If, therefore, the appellant had a *right of residence* here, it is extremely clear that it is a right which could not be taken away by mere *legislation*. Such taking away could not be effected without first taking away his liberty. It is very certain that he never himself surrendered the right, unless his departure from the country under all the guaranties supplied by the Acts of 1882 and 1884 is to be deemed such a surrender; and such an assertion may safely be left unanswered. It follows, therefore, that the appellant had the right to land when the writ issued.

(*c.*) It will be observed that the right of the appellant *to return* to the United States is based, so far as above insisted upon, not upon any *contract* between him and that Government, but upon a title or right to *be* in that country when the writ issued—a title or right fully acquired by, and vested, in him by his coming here under the permission of the laws and treaties under which he came. It was granted to him by *law;* but, when once granted, could not be taken away by mere law, for two reasons: (1), because it was a *valuable* right like an estate in lands, and the taking of it away would necessarily involve the taking away of his *liberty;* and (2), because, whatever sovereign powers may, in general, do in the way of banishing aliens, no power

to do that has been delegated to the Congress of the United States.

3. But another, and perhaps more clearly demonstrable basis for the asserted right of the appellant to return, is that which refers the acquisition of it to a *contract.*

That there was a contract between the appellant and the United States by which the latter became bound to permit his return is very clear.

The provisions of Acts of 1882 and 1884 (Stats. of 1882, p. 58, of 1884, p. 113), contained an *offer* on the part of the United States to every Chinese laborer then in this country, if he should leave the country and comply with the conditions therein for such case specified, to permit him to return. That offer was accepted and the conditions were fully complied with by the appellant. This created a perfect contract, binding upon the United States.

(*a.*) The *consideration* was perfect. It was that the appellant would give up his actual residence in the United States, with all the rights and benefits which such residence conferred upon him, undertake the expense and hazard of a journey abroad, and procure certain documentary evidence. The circumstance that these things were of no benefit to the United States is wholly immaterial. The *sacrifice* by the appellant completely answers the conception of consideration.

(*b.*) As it was not a case of *mutual* promises,

but the promise was only on the side of the United States, it was a *unilateral* contract, and the promise was one which would not become binding until the full *performance* of the consideration. It was fully performed.

4. The contract being thus fully *executed* by the appellant, he *completely acquired* the right which it was agreed he should have upon its execution. No *muniment* of title was necessary in order to complete the investiture. It was as perfectly vested as the title to real property is vested by the execution and delivery of a deed.

5. It may possibly be urged that the making of contracts are *executive* acts, not within the ordinary contemplation of legislation, and that the laws in question should not be deemed as containing *offers*, but as being pieces of simple legislation, subject to repeal at any time, and that all persons should take notice of this fact and consider that they acted at their peril; and that in the present case the Chinese laborers were bound to know that in leaving the country they took the peril of a repeal of the laws. Such a suggestion would be an entire perversion of the real fact.

(*a*). The making through the instrumentality of laws of *offers* for contracts is perfectly familiar. Laws making provision for sales of public lands, for giving rewards for the apprehen-

sion of criminals, for the furnishing of supplies to the public, and for the construction of public works, are common instances. That offers *may* be thus made is plain; the only question in a particular case is whether an offer was *intended*.

(*b*.) States, as well as individuals, are moral agents, and the common rules of morality and good faith are as binding upon them as upon individuals; and when one man declares to another that he will, in case such other will do or suffer a certain thing, bestow upon the latter an *advantage*, and thus tempt him to act or suffer upon the faith of the promise, he will not be heard to say that he did not *intend* to make an offer.

(*c*.) The question is, *was it contemplated* by the acts of Congress of 1882 and 1884 that the Chinese laborers would *act* upon the assurance therein contained? If it was, those acts must be deemed to have intended the making of offers. The contrary supposal would impute to Congress the deliberate intention of holding out expectations which it knew would be acted upon without meaning to make them good.

(*d*.) The answer to the above question cannot be doubtful. It declares that the exclusion from the country *shall not apply* to Chinese laborers now resident in it and who may wish to go away with intent to return, provides documentary evidence establishing their identity in the shape of a formal certificate, and

declares that such certificate "*shall entitle* the Chinese laborer to whom the same is issued to return to, and re-enter the United States." It is not in this Court that any argument is necessary to show that these statutes *contemplate* that individuals affected by them will act upon the faith of the assurance which they contain.

6. If we have succeeded in establishing that the appellant had a vested right to return, acquired by *contract*, we need spend no time in asserting that it could not be taken away by a mere exercise of legislative power.

The Sinking Fund Cases, 99 U. S., 700.

7. There are, indeed, exceptions to the doctrines above mentioned. The existence of war, or pestilence, might have justified the refusal of permission to land. Any thing which, by the rules of law, destroys or suspends the operations of a contract, would have been effective upon the one in question. But no such ground is suggested in the present case. The exclusion act of 1888, and that alone, was invoked by way of justification.

**Fourth Point.**—The Act of 1888, so far as respects Chinese laborers of the class of which the appellant is one, is unconstitutional, as being a bill of attainder, or *ex post facto* law.

1. If the appellant had a right to return, the depriving him of such right is *punishment*, and this cannot be inflicted except by judicial sentence.

**Lastly.**—The judgment or order appealed from should be reversed.

JAMES C. CARTER,
Of Counsel for Appellant.

SUPREME COURT, U. S.
FILED
MAR 10 1899
JAMES H. MCKENNEY,
CLERK

# SUPREME COURT OF THE UNITED STATES.

No. 1446.

CHAE CHAN PING,
*Appellant,*

*against*

UNITED STATES,
*Appellee.*

# BRIEF FOR APPELLANT.

GEORGE HOADLY,
JAMES C. CARTER,
*Of Counsel.*

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

IN THE

# Supreme Court of the United States.

CHAE CHAN PING,
*Appellant,*

vs.

UNITED STATES,
*Appellee.*

Brief for Appellant.

## Statement of Facts.

This is an appeal from the Circuit Court of the United States for the Northern District of California. Chae Chan Ping is a Chinese laborer, a subject of the Emperor of China. He resided in the State of California, following the occupation of laborer at San Francisco, from 1875 until June 2d, 1887. On the last-named day he departed for China on the steamship "Gaelic," having in his possession a certificate, duly issued by the Collector of Customs of the Port of San Francisco, in accordance with the fourth section of the Restriction Act of 1882, as amended in 1884. He sailed from Hong Kong, on his return to California, in the steamship "Belgic," September 7th, 1888. On the

day of the approval of the Chinese Exclusion act, October 1, 1888, he was on the high seas, on said steamer, *en route* for California. On the 7th day of October, 1888, the steamer "Belgic" reached the port of San Francisco. Appellant there presented his certificate to the proper Custom House officer and demanded permission to land.

The Collector refused to permit him to land, solely for the reason that, under the act of Congress, approved October 1, 1888, supplemental to the Restriction acts of 1882 and 1884, the certificate was null and void, and his right to land abrogated, and that he was thereby forbidden again to enter the United States. The above is shown by the findings of the Circuit Court, at page 7 of the Record. On the 10th day of October, 1888, a writ of *habeas corpus* was issued, directed to the master of the steamship "Belgic," commanding him to have the body of appellant before the Judge of the Circuit Court, together with the time and cause of his detention, that he might be restored to his liberty if it were unjustly withheld. This was upon the petition, verified and filed October 10th, 1888, of Jaia Mon Tong. In obedience to the writ of *habeas corpus*, Capt. G. Wright, master of the steamship "Belgic," on October 12th, produced the body of appellant in the Circuit Court at San Francisco. Upon the hearing the Court found the facts, as aforesaid, with conclusions of law, viz.:

(1), that appellant was not entitled to enter the United States;

(2), was not unlawfully restrained of his liberty;

and ordered him to be remanded to the custody of the master of the Steamship "Belgic," whence he had been taken by the writ of *habeas corpus*, (Record, p. 7).

The certificate held by Chae Chan Ping, and by him presented to the Collector, upon which he asserted the right to land from the steamship "Belgic," is made part of the Record, (page 6). It is numbered Certificate No. 53,778, and begins with the words:

"United States of America, Custom House, Port of San Francisco,"

and is entitled,—

"Certificate furnished to the following named Chinese laborer departing from the United States for production to a Customs officer on his return."

Then follows his "description" as follows:

"Name of individual: Ping, Chan Chae.
Age: 34.
Height: 5 feet, $3\frac{5}{8}$ inches.
Complexion: brown.
Color of eyes: brown.
Physical marks or peculiarities of identification: small mole on upper lip and right corner of mouth.
Occupation, kind: laborer.
When followed: 1875 to 1887.
Where followed: San Francisco, Cal.
Last place of residence: San Francisco, Cal."

After this identification is added the following certificate, signed by the Deputy Collector of Customs, with his official seal attached:

"I certify that the Chinese laborer to whom this certificate is issued is entitled, in accordance with the provisions of the Act of Congress, approved May 6th, 1882, as amended by the Act of July 5th, 1884, to return to and re-enter the United States upon producing and delivering this certificate to the Collector of

day of the approval of the Chinese Exclusion act, October 1, 1888, he was on the high seas, on said steamer, *en route* for California. On the 7th day of October, 1888, the steamer "Belgic" reached the port of San Francisco. Appellant there presented his certificate to the proper Custom House officer and demanded permission to land.

The Collector refused to permit him to land, solely for the reason that, under the act of Congress, approved October 1, 1888, supplemental to the Restriction acts of 1882 and 1884, the certificate was null and void, and his right to land abrogated, and that he was thereby forbidden again to enter the United States. The above is shown by the findings of the Circuit Court, at page 7 of the Record. On the 10th day of October, 1888, a writ of *habeas corpus* was issued, directed to the master of the steamship "Belgic," commanding him to have the body of appellant before the Judge of the Circuit Court, together with the time and cause of his detention, that he might be restored to his liberty if it were unjustly withheld. This was upon the petition, verified and filed October 10th, 1888, of Jaia Mon Tong. In obedience to the writ of *habeas corpus*, Capt. G. Wright, master of the steamship "Belgic," on October 12th, produced the body of appellant in the Circuit Court at San Francisco. Upon the hearing the Court found the facts, as aforesaid, with conclusions of law, viz.:

(1), that appellant was not entitled to enter the United States;

(2), was not unlawfully restrained of his liberty;

and ordered him to be remanded to the custody of the master of the Steamship "Belgic," whence he had been taken by the writ of *habeas corpus*, (Record, p. 7).

The certificate held by Chae Chan Ping, and by him presented to the Collector, upon which he asserted the right to land from the steamship "Belgic," is made part of the Record, (page 6). It is numbered Certificate No. 53,778, and begins with the words:

"United States of America, Custom House, Port of San Francisco,"

and is entitled,—

"Certificate furnished to the following named Chinese laborer departing from the United States for production to a Customs officer on his return."

Then follows his "description" as follows:

"Name of individual: Ping, Chan Chae.
Age: 34.
Height: 5 feet, $3\frac{5}{8}$ inches.
Complexion: brown.
Color of eyes: brown.
Physical marks or peculiarities of identification: small mole on upper lip and right corner of mouth.
Occupation, kind: laborer.
When followed: 1875 to 1887.
Where followed: San Francisco, Cal.
Last place of residence: San Francisco, Cal."

After this identification is added the following certificate, signed by the Deputy Collector of Customs, with his official seal attached:

"I certify that the Chinese laborer to whom this certificate is issued is entitled, in accordance with the provisions of the Act of Congress, approved May 6th, 1882, as amended by the Act of July 5th, 1884, to return to and re-enter the United States upon producing and delivering this certificate to the Collector of

Customs of the district at which he shall seek to re-enter.

Witness my hand and official seal, this second day of June, 1887."

## Assignment of Errors.

The Court erred in each and all of its conclusions of law, and in its judgment remanding appellant to the custody of the master of the steamship whence he had been taken.

## ARGUMENT.

### I.

### Of the Acts of Congress and Treaty with China.

*First:* Of the acts under which it is sought to banish Chae Chan Ping from his domicile and home. Having resumed his *de facto* residence in San Francisco, by his actual return to that city, the operation and effect of the Exclusion act, (commonly so-called), is to exile or banish him—not merely to exclude him by forbidding his entry,—but to expel him after having entered, and, accordingly, the Circuit Court of the United States for the District of California, having determined that the Exclusion act is constitutional, and that Chae Chan Ping is vested with no rights which prevent its application to him, proceeded to banish him by

remanding him to the custody of the captain of the steamer "Belgic," presumably for transportation back to Hong Kong. The effect of the Exclusion act upon other Chinese laborers, holding like certificates, is, if valid, to cut off and destroy their legal domiciles, and as effectually banishes them from their homes, as if, like Chae Chan Ping, they had reached the United States, and attempted to resume their *de facto* residences therein.

The act of Congress, under which this result was for the time reached, and is justified, is Chapter 1064 of the acts of the first session of the *Fiftieth* Congress, approved October 1st, 1888, to be found at page 504 of the Public Statutes of that session, the title of which is:

"An Act, a supplement to an act entitled 'An Act to execute certain treaty stipulations relating to Chinese' approved the sixth day of May, 1882."

We copy the entire act, as follows:

"That from and after the passage of this act it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.

SEC. 2. That no certificates of identity provided for in the fourth and fifth sections of the Act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

SEC. 3. That all the duties prescribed, liabilities, penalties and forfeitures imposed, and the powers conferred by the second, tenth, eleventh and twelfth sections of the act, to which this is a supplement, are

hereby extended and made applicable to the provisions of this act.

SEC. 4. That all such part or parts of the act, to which this is a supplement, as are inconsistent herewith, are hereby repealed."

Eighteen days before the passage of this act, viz., September 13th, 1888, (six days after Chae Chan Ping had sailed from Hong Kong), an act had passed the same Congress, and been approved by the President, (Chapter 1015, page 476, of the Public Statutes of the first Session of the *Fiftieth* Congress), entitled :

"An Act to prohibit the coming of Chinese laborers to the United States,"

which has not become effectual as law, for the reason that its provisions were expressly made dependent upon and to take effect—

"from and after the date of the exchange of ratifications of the pending treaty between the United States of America and His Imperial Majesty, the Emperor of China, signed on the 12th day of March, Anno Domini 1888,"

which treaty has not yet been ratified by China.

The act of Congress, to which the Exclusion act of October 31st, 1888, is supplementary, is to be found at page 58 of Volume 22 of the United States Statutes at Large, was approved May 6th, 1882, and is Chapter 126 of the Public Statutes of the Forty-seventh Congress, entitled—

"An act to execute certain treaty stipulations relating to Chinese."

The first section suspends from the expiration of ninety days next after the passage of the act, until the expiration of ten years from the same date, the

coming of Chinese laborers to the United States. The *third* section provides that this exclusion—

"shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and who shall produce to such master before going on board such vessel, and shall produce to the Collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required, of his being one of the laborers in this section mentioned."

Section 4 was as follows, (italics ours):

"That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, 1880, or who shall come into the same before the expiration of ninety days next after the passage of this act, *and in order to furnish them with the proper evidence of their right to go and come to the United States of their free will and accord*, as provided for by the treaty between the United States and China, dated November 17, 1880, the Collector of Customs of the district from which any such Chinese laborer shall depart from the United States shall in person or by deputy go on board each vessel having on board any such Chinese laborer and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books to be kept for that purpose, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which book shall be safely kept in the Custom House, *and every such Chinese laborer so departing from the United States shall be entitled to, and shall receive*, free of any charge or cost, upon application therefor from the Collector or his deputy at the time such list is taken, *a certificate signed by the Collector or his deputy* and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the name, age, occupation, last place of

residence, personal description and facts of identification of the Chinese laboror to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer after having received such certificate shall leave such vessel before her departure, he shall deliver his certificate to the master of the vessel, and if such Chinese laborer shall fail to return to such vessel before her departure from the port, the certificate shall be delivered by the master to the Collector of Customs for cancellation.

*The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the Collector of Customs of the district at which such Chinese laborer shall seek to re-enter;* and upon delivery of such certificate by such Chinese laborer to the Collector of Customs at the time of re-entry in the United States, said Collector shall cause the same to be filed in the Customs House and duly canceled."

Other sections of the act provided for like certificates to be issued to Chinese laborers desiring to leave the country by land, also for the admission of Chinese persons, other than laborers, upon certificates of identity furnished by the Chinese government.

The masters of vessels arriving in the United States from foreign ports or places were required by the *eighth* section to furnish the Collector of Customs a separate list of Chinese passengers. The *ninth* section provided that before any Chinese passengers should land from any such vessel the collector or his deputy should examine said passengers, comparing their certificates with the list and with the passengers. The *twelfth* section contained the following provision:

"And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, *after being brought before some*

*Justice, Judge or Commissioner of a Court of the United States, and found to be one not lawfully entitled to be or remain in the United States.*"

This act was amended by act approved July 5th, 1884, (23 Statutes at Large, 115).

The *third, fourth* and *twelfth* sections of this amendatory act are as follows, (italics ours) :

"Sec. 3. *That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty,* or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, *nor shall said sections apply to Chinese laborers, who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned;* nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or stress of weather, or touching at any port of the United States on its voyage to any foreign port or place. *Provided:* That all Chinese laborers brought on such vessel shall not be permitted to land except in case of absolute necessity, and must depart with the vessel on leaving port."

SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, *and in order to furnish them with the proper evidence of their right to go from and come to the United States as provided by the said act and treaty between the United States and China, dated November seventeenth, eighteen hundred and eighty,* the Collector of Customs of the district from which any such Chinese laborer shall depart from the United States, shall, in person or by deputy, go on board

each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry books to be kept for that purpose in which shall be stated the individual, family and tribal name in full, the age, occupation, when and where followed, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the Custom House; *and every such Chinese laborer so departing from the United States shall be entitled to and shall receive free of any charge or cost upon application therefor, from the Collector or his deputy, in the name of said Collector and attested by said Collector's seal of office,* at the time such list is taken *a certificate signed by the Collector or his deputy,* and attested by his seal of office in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the individual, family, and tribal name in full, age, occupation, when and where followed, of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure, he shall deliver his certificate to the master of the vessel; and if such Chinese laborer shall fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the Collector of Customs for cancellation. *The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the Collector of Customs of the district at which such Chinese laborer shall seek to re-enter,* and said certificate shall be the only evidence permissible to establish the right of re-entry; and upon delivery of such certificate by such Chinese laborer to the Collector of Customs at the time of re-entry in the United States, said Collector shall cause the same to be filed in the Custom House and duly canceled.

Sec. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from

a vessel. *And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge or commissioner of a Court of the United States and found to be one not lawfully entitled to be or to remain in the United States ;* and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal ; and all peace officers of the several States and territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come to the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this act."

*Secondly:* the treaty between the United States and China concerning immigration, in execution of which the acts of Congress of 1882 and 1884 were passed, was concluded November 17th, 1880 ;—ratification advised by the Senate May 5, 1881 ;—ratified by the President, May 9th, 1881 ;—ratifications exchanged July 19th, 1881 ;—proclaimed October 5th, 1881. (22 Statutes at large, 826.) It recites that its execution proceeds from a desire of the Government of the United States,

"to negotiate a modification of the existing Treaties which shall not be in direct contravention of their spirit,"—

and provides, (Article 1), "among other articles in modification," that, (italics ours),

" Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States *may regulate, limit or suspend such coming or residence but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers,* other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

Article II is as follows :

" Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, *and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord,* and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

It is shown by the certificate in evidence that Chae Chan Ping gained his residence in California in 1875, and before any of the laws or treaties hereinbefore referred to. At that time, the treaty of July 28th, 1868, commonly known as the " Burlingame Treaty," was in force, (as it still is, except so far as modified by the treaty of 1881, or the subsequent legislation of the United States,) of which the following are portions :

" ARTICLE V.

The United States of America and the Emperor of China cordially recognize the inherent and inalienable

right of man to change his home and allegiance, and also the mutual advantage of the free migration and immigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or as permanent residence. * * *

ARTICLE VI.

Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and reciprocally, Chinese subjects, visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.

ARTICLE VII.

Citizens of the United States shall enjoy all the privileges of the public educational institutions under the control of the Government of China; and reciprocally, Chinese subjects shall enjoy all the privileges of the public educational institutions under the control of the Government of the United States which are enjoyed in the respective countries by the citizens or subjects of the most favored nations. The citizens of the United States may freely establish and maintain schools within the Empire of China at those places where foreigners are by treaty permitted to reside; and reciprocally, Chinese subjects may enjoy the same privileges and immunities in the United States."

## II.

### Rights of Chae Chan Ping.

It is not our purpose to appeal to any higher law than the Constitution and Laws of the United States, although it is doubtless a principle of the law of nations, as understood among civilized nations and in modern times, that no nation has the right to close its doors to foreigners.

Dr. Woolsey, (International Law, 5th ed., Section 63), says:

"We have already come to the conclusion that sovereignty in the strictest sense authorizes a nation to decide upon what terms it will have intercourse with foreigners and even to shut out all mankind from its borders * * * and yet some kind of intercourse of neighboring States is so natural that it must have been coeval with their foundation and with the origin of law; it is so necessary that to decline it involves often extreme inhumanity; it is so essential to the progress of mankind that unjust wars have been blessings when they open nations to one another. There could of course be no international law without it. The following maxims relating to the so-called right are in substance laid down by Heffter, (Section 33 of his 'Voelker., 5th ed.) 1. Entire non-intercourse shuts a nation out from being a partner in international law * * * 5. In its intercourse with others every State is bound to truth and honesty, (without which intercourse must be broken up). 6. No State in peace can exclude the properly documented subjects of another friendly State or send them away after they have been once admitted without definite reasons, which must be submitted to the foreign government concerned."

Mr. David Dudley Field's draft of a proposed Code of International Law, Section 318, is as follows:

"No nation has the right to interdict absolutely the

entrance of foreigners into its territory or to close the country to foreign commerce."

Bluntschli, *(Das Moderne Voelkerrecht der Civilisirten Staaten)*, Section 381, says the same:

"Kein Staat ist berechtigt den Fremden ueberhaupt die Betretung seines Gebiets zu untersagen und sein Land von dem allgemeinen Verkehr abzusperren."

This section of Blunstchli is substantially identical with Mr. Field's 318th section already quoted.

Bluntschli subjoins the following comment on the rule:

"Modern international law maintains that it is a duty to protect the friendly intercourse of mankind. The old theory was derived from the idea of the sovereignty of the state, from which followed the power of the state to exclude all foreigners; but states, however, are but members of the human race, *(Glieder der Menschheit)*, and therefore are obliged to regard the unity of mankind. Their sovereignty is therefore not absolute, but limited by the law of nations.

The entire prohibition of foreign commerce has been attempted at various times by different states, not only by savage hordes, who consider every stranger hostile, but by civilized peoples, such as the Egyptians of antiquity and the Japanese until a few decades ago.

The international law of to-day can brook no such policy of exclusion. Naturally the recognition of the right to travel and of intercourse can be attained only by degrees. It is equally impossible, (*ebenso wenig zu dulden*), to tolerate the exclusion of foreigners of other creeds, as of Christians in Morocco and Bokhara."

Bluntschli's 382d rule limits the power of exclusion in modern international law to its true bounds, thus:

"Every State is justified in denying to individual *(einzelnen)* foreigners, on grounds of right as well as policy, entrance into its domain."

The 320th Section of Mr. Field's draft Code relating

to the propriety of prohibiting the importation of laborers under contract, concludes with these words:

"But nothing in the act is to be deemed or construed to apply to or affect any free or voluntary immigration of any Chinese subject."

His 321st Section is in these words:

"No nation can expel the members of another nation without special cause which must be explained to the nation, the members of which are expelled."

As to the treaty with China, we do not deny the plenary power of Congress at will to abrogate each and every one of its provisions.

Neither do we dispute the power of Congress to adopt the system, which the Chinese themselves have abandoned, of excluding intercourse with foreigners.

Our proposition is, that, under the Constitution and laws of the United States, Chae Chan Ping was and is entitled to be discharged upon the writ of *habeas corpus*, which was issued for his benefit by the Circuit Court of the United States at San Francisco.

The *third* section of the Exclusion act provides,

"that all the duties prescribed, liabilities, penalties and forfeitures imposed and powers conferred,"

by the *twelfth* section of the act of 1884, are

"extended and made applicable to the provisions of"

the Exclusion act itself.

Assuming, for the present, that one of the methods prescribed by this *twelfth* section, of ascertaining whether a Chinese laborer is

"one not lawfully entitled to be or to remain in the United States,"

is the writ of *habeas corpus* resorted to in this case, we

proceed to inquire whether, upon the hearing thus had, Chae Chan Ping was

"unlawfully within the United States,"

when the steamer "Belgic" reached San Francisco.

The treaty between the United States and China, ratified in 1881, is not claimed to have conferred any more substantial right upon appellant, than he would have derived from a statute of the United States containing the same language. The treaty was doubtless a contract between the United States and China. While it remained binding as such upon both these high contracting parties, it was also a law of the United States. We do not claim that Chae Chan Ping has the right to enforce its stipulations or to complain of their breach. Our contention is, that, being a law of the United States, he took, under it, rights, of which he cannot be deprived by subsequent legislation.

In the Head Money cases, (*Edye vs. Robertson*, 112 U. S., 580), Mr. Justice MILLER says, at page 598:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of another, which partake of the nature of municipal law and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of

citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that 'this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute."

We do not deny the plenary power of Congress over the treaty and over its own legislation so as to forbid the future immigration of Chinese laborers, and the future issue of certificates such as described in the acts of 1882 and 1884, *Chew Heong vs. United States*, 112 U. S., 536.

Mr. Justice MILLER adds, (p. 592), to the passage already quoted from his opinion in the Head Money cases, these sentences :

" But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the government by which the treaty is made which gives it this superior sanctity."

The proposition we make is, that, in the execution of the treaty of 1881, and of the laws of 1882 and 1884, Chae Chan Ping, the appellant, acquired rights of which he has not been and cannot be divested by the Exclusion act of October, 1, 1888.

Mr. Justice MILLER illustrates the effect of a treaty in conferring rights upon citizens by the case of——

"rights of property by descent or inheritance when the individuals concerned are aliens."

In *Society for the Propagation of the Gospel vs. New Haven*, 8 Wheaton, 464, it is held that, (*syllabus*),

"The termination of a treaty, by war, does not divest rights of property already vested under it."

Mr. Justice WASHINGTON, at p. 493, says:

"But there is still a more decisive answer to this objection, which is, that the termination of a treaty cannot divest rights of property already vested under it. If real estate be purchased or secured under a treaty, it would be most mischievous to admit, that the extinguishment of the treaty, extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that right of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests."

See also *McClurg vs. Kingsland*, 1 How., 206.

It will, therefore, be admitted that when property rights have been acquired by an alien, resident or non-resident of a State, under the authority of a treaty, or law passed in execution of a treaty, the legal protection of the owner is as complete as if the acquisition had been the result of power granted by a law passed without reference to any treaty. In these cases we suppose it could not be successfully contended that Congress has sufficient control over the right of property, to be able to divest it by the mere exercise of legislation, or otherwise than through the power of eminent domain.

Is the liberty of those who enjoy or have been promised our hospitality less sacred, less entitled to legal protection, than their property? Is this the progress of American civilization? This, the goal reached at the beginning of our second century of self-government? We maintain that the liberty of Chae Chan Ping, his right to return to the United States and resume his actual residence in California, and to remain, after such return, are as secure from legislative intrusion and disturbance as would have been his title to and possession of property acquired by the permission of treaty stipulations, and legislation passed in pursuance thereof, if its confiscation, instead of his personal exclusion from the country, were attempted.

Our contention is, *first*, that by accepting the invitation of the United States, and the written promise of its officer, authorized by the statute, and shown by the certificate issued in pursuance of law, the appellant entered into contractual relations with the United States, and they with him, whereby they undertook and agreed, in consideration of his leaving the country in the faith and confidence of their assurance of his right to return, that he should be "entitled" to return; and, *secondly*, that even if the obligation be not contractual, nevertheless it vested in him an executed franchise or right to return, of which he cannot be deprived by any legislation which Congress is made competent by the Constitution to adopt during peace with China.

The war powers of Congress and the Executive are wholly apart from this discussion. We are only concerned with the relations between Chae Chan Ping and the United States at a time when the Emperor of China,

whose subject he is, is at peace with the Government of the United States, and when he is not a belligerent or the subject of a belligerent, and when no special authority for his exclusion is derived from the laws of war.

*First.* As to the *contractual* character of the relations entered into by Chae Chan Ping with the United States when he left the country. Had these been between private persons or related to property, it is believed that the statement of the facts would be sufficiently convincing without extended argument. If *A* offer his tenant that he may return at will, after a period, into the premises, and occupy for the rest of the term, if he presently surrender the term and withdraw therefrom, *A* can only deny the right of the tenant to re-enter, (if at all), when he might have excluded him in the beginning, or when he may oust him at will after re-entering. Even in this case, the agreement that the tenant may re-enter might be plausibly claimed to entitle him to re-enter, even though *A* might have dispossessed him capriciously under the terms of the original holding. The transaction would be sustained, if necessary, as a re-letting, but it would be upheld, theory or no theory. He who seeks, in this aspect of the discussion, to sustain the judgment of the Circuit Court, will be compelled to prove, therefore, that the United States may by statute expel the resident Chinese who are now among us, or, in other words, either that Chae Chan Ping furnished no consideration when he accepted the invitation of the United States to depart, trusting its solemn promise that he might return, or that the right which would be conferred upon the tenant in the supposed case is a mere privilege or license, revocable at the caprice

of the landlord, or that the relations of Chae Chan Ping with the United States differ, by reason of their being a government, from those of private persons, *e. g.* from those which the landlord would enter into in the supposed case. Illustrations might be multiplied but it is unnecessary. Wherever, in the whole range of dealings among men, one party submits to a sacrifice, induced by the promise of another to do or permit some act or render some service beneficial to the first party, the relation has always, whether entered into by citizens or States, been considered in civilized countries contractual and incapable of dissolution at the instance of the promisor alone, whatever right the promisee might have to rescind.

"Damage to the promisee constitutes as good a consideration as benefit to the promisor."

STORY, J., in *Townsley vs. Sumrall*, 2 Peters, 182.

Prof. Langdell, (Summary of the Law of Contracts, 2d ed., 62), says:

"On the other hand, detriment to the promisee is a universal test of the sufficiency of consideration, *i. e.*, every consideration must possess this quality, and possessing this quality, it is immaterial whether it is a benefit to the promisor or not."

This class of contracts was called, in the civil law, "*innominati.*" These were real contracts, consensual, innominate. Consensual, because consent preceded or accompanied the act, or sacrifice, in exchange for which the promise of the second party was made. It is immaterial under which of the innominate contracts this obligation be classed; whether it be said to be *do ut facias* or *facio ut facias*. Ever since the praetor introduced

equitable considerations into Roman law, this class of contracts has been recognized as enforceable by its appropriate action, this being, under the civil law system, the *actio in factum prescriptis verbis*. *Poste's Gaius, 372.* Digest 9, 5, 15; *Ibid., 22; Ibid., 25.*

Mr. Poste, at page 374, commenting on Section 90 of the 3d Book of Gaius, says:

"It may illustrate the Roman conception of Innominate or Real contract, if we indicate the change that has supervened in this matter from the greater force that is conceded to mere convention, (*nuda voluntas*), in modern jurisprudence.

"With the Romans, the execution by one of the parties of his part of an innominate bilateral convention was essential to its efficacy. This execution differentiated the convention from a *nudum pactum* and gave it validity, but naturally only against the party who had not executed. The party who had executed was not similarly bound: he had a right of abandoning the contract and recovering back what he had delivered, not merely when the counter-execution was not made at the time appointed, or had become impossible by the *culpa* of the other party, or had been always impossible, (*condictio ob causam non secutam*), but when the party who had delivered simply changed his inclination, (*condictio ex mera pœnitentia*).

"In German jurisprudence, on the contrary, where every *pactum* is treated as if it had been accompanied by stipulation, that is, had the validity given by form,—where, in other words, no *pacta* are *nuda*, all are *vestita*,—a convention is enforceable irrespectively of its part execution; it is enforceable, irrespectively of execution, against both parties alike, who herein stand on precisely the same footing; that is to say, the party who has delivered what he had to deliver has no right to recover it back either *ex mera pœnitentia* or *ob causam non secutam*, but merely the power to compel the other party to a corresponding performance. (*Vangerow, Sec. 599*)."

In *Sandars' Institutes of Justinian*, at page 419, the

learned author, in commenting on *Lib. 3, Tit. 14*, says:

"When an agreement did not take the shape of any of the ten forms of contract recognized in the civil law, (it will be remembered that the heads *re* and *consensu* have each four subdivisions), it was, strictly speaking, not a contract at all, but if one party to it had executed it, the praetor would force the other party to execute it also. These contracts, as having no special name, have been termed *contractus innominati*, and as the contract sprang into existence by a thing having been done or given, by the fact, that is, of the contract being already executed by one party to it, these *contractus innominati* may be looked on as belonging more immediately to the heads of the contracts made *re*. *Paulus, (D. XIX. 5, 5)*, thus sums up the heads of the cases in which such contracts might arise: '*Aut do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias.*' I give something to you in such a way that by the fact of my gift, *(re)*, you are bound to give something to me, or I give so that you are bound to do something for me, or I do something for you so that you are bound to give me something, or I do something for you so that you are bound to do something for me. Contracts of this sort would, as we have said in the notes to the last Title, be enforced by an *actio in factum præscriptis verbis*, by one, that is, in which the *formula* would be arranged to meet the circumstances of this particular case, *(in factum)*, a short statement of these circumstances being placed in the *demonstratio, (præscriptis verbis)*."

Prof. Parsons, *(1 Parsons on Contracts, p. 429)* says:

"By the civil law and the modern continental law the consideration is the *cause* of the contract. This principle is quoted and apparently adopted by *Plowden;* and it has been recently acknowledged by high judicial authority and the *cause* distinctly discriminated from the *motive*."

To this proposition, the learned Professor cites *Thomas vs. Thomas*, 2 Q. B., 851, in which PATTESON, J., says:

"It would be giving to '*causa*' too large a construction if we were to adopt the view urged for the defendant. It would be confounding consideration with motive. Motive is not the same thing with consideration. Consideration means something which is of some value in the eye of the law moving from the plaintiff. It may be some benefit to the defendant or some detriment to the plaintiff, but, at all events, it must be moving from the plaintiff.

Certainly the departure of Chae Chan Ping from the United States was the *cause* of the contract. It is quite true that he might have received the certificate, and then left the ship at the moment of sailing, but in this case, provision is made by the *fourth* section of the acts of 1882 and 1884, for its cancellation.

The certificate was issuable only to a *departing* Mongolian. It was made the "right" of such a Chinese laborer to receive it. His departure, therefore, *caused* it—became its consideration. The sacrifice involved in his departure, the detriment suffered by him, induced the issue of the certificate. The invitation of the United States is practically to be read from the statute thus:

"If you depart, we guarantee that you shall be 'entitled' to return, and, as evidence of your 'right' to return, we direct our Collector of Customs at the port of your departure, to issue a certificate, which shall so identify you as to prevent any other Chinese laborer from making use of it for the purpose of entering the country, and shall insure you the exercise of the right thus guaranteed, and for which your departure is the inducing cause or consideration."

The Chinese laborer who leaves the United States is not *required* to receive the certificate entitling him to return. He may go without it. The records of the

San Francisco Custom House show, as we are informed, that between August 2, 1882, and December 31, 1887, 5,021 Chinese left that port without, and 57,347 with certificates. The right to the certificate is conferred by the treaty and the act, the language of the latter being,

"and every such Chinese laborer, so departing from the United States, shall be entitled to, and shall receive, * * * upon application therefor, * * * a certificate, signed by the collector or his deputy, * * * ."

The effect of the certificate is, therefore, two-fold: *first*, it establishes the purpose of the Chinese laborer to return;—he does not give up his residence when he departs with the certificate;—and *secondly*, it determines that his departure is induced by the promise of the United States that he may return. He might go without the certificate. In such case there would be reason to contend that he went *animo non revertendi*;—also that his departure was not caused or induced by the hope or expectation of returning, or by the promise of the United States that he might return. But when he go, bearing with him this certificate, issued to him only on "application," as evidence, not only of his identity, but of his "right" to return,—which "entitles" him to return,—the conclusive presumption, we respectfully submit, is, that he makes the sacrifice involved in his departure, because of,—induced by,—the right to return so guaranteed by the United States, and that he would not have left, had not the United States entered into contractual relations with him, securing him such right to return.

In *Dartmouth College vs. Woodward*, 4 Wheaton, 655,

Mr. Justice WASHINGTON adopts the definition of a contract stated in *Powell on Contracts* thus:

"1. What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. *Powell on Cont., 6.* Under this definition, says Mr. Powell, it is obvious that every feoffment, gift, grant, agreement, promise, etc., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved; these must all concur, because the regular effect of all contracts is, on one side to acquire, and on the other to part with some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do or restraining them from doing, something which before they might have done or omitted. If a doubt could exist that a grant is a contract, the point was decided in the case of *Fletcher vs. Peck, 6 Cranch, 87*, in which it was laid down that a contract is either executory or executed; by the former, a party binds himself to do or not to do a particular thing; the latter is one in which the object of the contract is performed, and this differs in nothing from a grant; but whether executed or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the Constitution of the United States, which forbids the State Governments to pass laws impairing the obligation of contracts."

The cases of *Fletcher vs. Peck*, *Dartmouth College vs. Woodward*, and their numerous successors, dispose of any contention which might have been based on the character of one of the parties to the present contract, being a Government. This very objection was presented to this Court, in *Fletcher vs. Peck*, fully considered by Chief-Justice MARSHALL and his associates,

and finally and conclusively answered in the opinion of the Chief-Justice at pp. 137–139 of 6 Cranch. The State of Georgia made the grant sustained in *Fletcher vs. Peck*, —the British Crown established Dartmouth College. Cases without number might be cited from the volumes of American reports, State and Federal, in none of which, it is believed, has it ever been successfully maintained, that the fact that one of the parties, to the obligation or promise, was a Sovereign State precluded the other from asserting his just rights as party to a contract binding the Sovereign. The only difference between the Sovereign and the individual is that the former usually adopts the form of statute or ordinance as evidence of consent, and in the nature of the evidence, therefore, necessary to establish the contractual relation.

Referring again to Justice WASHINGTON'S opinion, it would seem as though language could not have been better adapted than that used by him to describe the present case. On one side, the effect of this contract was that Chae Chan Ping parted with the right to remain, for the time being, in the United States. He departed from the country. On the other, the Government of the United States agreed to abridge its right, (if it may, for the sake of the argument, be admitted to be such), of forbidding him to return. On the contrary, it agreed that he should be endowed with the franchise, freedom or liberty to return at will, and this endowment, evidenced by the certificate which was given him, we respectfully submit, he still enjoys or ought to enjoy.

Cases upon the subject of public rewards are in some

respects analogous to the present. In *Shuey vs. United States*, 92 U. S., 73, the Secretary of War had, on April 20, 1865, issued a proclamation, whereby he offered a reward of $25,000,

"for the apprehension of John H. Surratt, one of Booth's accomplices;"

also that—

"liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices."

On November 24, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt, (13 Stat. at Large, 778). This Court held, (*syllabus*), that—

"the party giving the information which led to the arrest was entitled to the "liberal reward," but not to the specific sum unless he in fact apprehended the fugitive or the arrest was made by his agents.

2. Where the offer of a reward is made by a public proclamation, it may before rights have accrued under it be withdrawn through the same channel in which it was made. No contract arises under such offer until its terms are complied with. The fact that the claimant of such reward was ignorant of such withdrawal is immaterial."

In *Loring vs. City of Boston*, 7 Metcalf, 409, Chief-Justice SHAW states the principle thus:

"There is now no question of the correctness of the legal principle on which this action is founded. The offer of a reward for the detection of an offender, the recovery of property and the like, is an offer or proposal on the part of the person making it to all persons, which any one capable of performing the service may accept at any time before it is revoked and perform the service; and such offer on the one side and acceptance and performance of the service on the other is a valid contract made on good consideration, which the

law will enforce. That this principle applies to the offer of a person to the public at large was settled in this Commonwealth in *Symmes vs. Frazier*, 6 Mass., 344, and it has been frequently acted upon, and was recognized in the late case of *Wentworth vs. Day*, 3 Met., 352."

In *Javrin vs. Town of Exeter*, 48 N. H., 83, the following language is used by Judge BELLOWS:

"The authority of the selectmen in behalf of a town to offer a reward for apprehending and securing any person charged with having committed any capital or other high crime, is expressly conferred by Chap. 735 of the Laws of 1848, and as no special remedy is provided by the Statute the contract may be enforced by action in some appropriate form. It stands for aught we can see upon the same ground as an offer of a reward by a private person, and it is well settled that if in consequence of such offer, the offender will be apprehended and secured according to the terms of the offer, and within a reasonable time, the person doing it may in an action of *assumpsit* recover the reward.

This is put upon the ground that although such an offer is a mere proposal or conditional promise, and may be revoked at pleasure, yet, if any one shall before the revocation perform the service, relying upon such offer, it becomes a legal and binding contract."

It seems to us plain that the offer of the United States was accepted, when Chae Chan Ping embarked on the steamer "Belgic," with the certificate of the Collector of Customs in his possession.

It may be objected that Chae Chan Ping is not a citizen of the United States. True, but he is, nevertheless, a "person," a member of the human race, within the definition and protection of the *Fifth* and *Fourteenth* Amendments to the Federal Constitution. If an artificial being, *e. g.*, Dartmouth College, may be created by statute, and endowed with franchises, which consti-

tute property under the protection of law, incapable of recall, and beyond the control of State or Federal authority other than in the exercise of eminent domain, there would seem to be no difficulty in supposing that Chae Chan Ping and the many other Chinese laborers, who, like him, were invited, not to say tempted, by the treaty of 1881 and the acts of 1882 and 1884, to leave the United States, by the solemn promise of this Government of a civilized and presumably honest people, are capable of being endowed, and have been vested with franchises or liberties quite as sacred. If the State of New Hampshire might not break the promise made by the British Crown to Darmouth College, there would seem to be no difficulty in the character of the promisor in holding the United States of America to the fulfillment of its written promise to Chae Chan Ping. If Dartmouth College, an artificial being, a creature of law, could accept and enforce the promise made to it, there would seem to be no difficulty in the enforcement by Chae Chan Ping, a living being, endowed with the faculties which nature confers on natural persons, including even those humble persons, known to the law as "Chinese laborers."

Sir William Blackstone, speaking of incorporeal hereditaments, says, (Black. Comm., II. 37):

"Franchises are a seventh species. Franchise and liberty are used as synonymous terms, and their definition is a royal privilege or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant, or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various and almost infinite. I will here briefly touch upon some of the principal, premising only that they may be vested

in either natural persons or bodies politic, in one man or in many; but the same identical franchise that has before been granted to one cannot be bestowed on another, for that would prejudice the former grant.

To be a county palatine is a franchise vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts, and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court-leet, to have a manor or lordship, or, at least, to have a lordship paramount, to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures and deodands; to have a court of one's own, or liberty of holding pleas and trying causes; to have the cognizance of pleas, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction; to have a bailiwick, or liberty exempt from the Sheriff of the county, wherein the grantee only, and his officers, are to execute all process; to have a fair or market, with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, which tolls must have a reasonable cause of commencement, (as in consideration of repairs or the like), else the franchise is illegal and void, or lastly, to have a forest, chase, park, warren or fishery, endowed with privileges of royalty, which species of franchise may require a more minute discussion."

Chief-Justice TANEY said, in *Bank of Augusta vs. Earle*, 13 Peters, 595, that:

"Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the State."

It is not essential to the franchise of the shareholder of a corporation that he should derive pecuniary profit

from his connection with the body corporate. On the contrary, this may be to his pecuniary detriment and loss. Yet his interest is nevertheless a franchise, a property right secured by contract with the Government granting him the privilege.

The right of the appellant differs from, but is superior to, that of the ordinary franchise conferred by the Government upon corporate shareholders in this, that, upon the invitation of the United States, the appellant executed the consideration on his part, furnished the *causa causans* of the Government's contract before calling on it to perform. And the pretense or excuse for non-performance by the Government now, is the fact of performance by him, viz: his absence from his residence in the United States! Congress has not ventured to banish the Chinese laborers who did not accept its invitation, and still remain at their places of residence.

Ordinarily, the franchise of the corporator, and of the corporation, is a mere gratuity from the Government, sustained upon the theory that it is in the nature of an executed contract. It would be difficult to establish any consideration for the great majority of modern corporate grants, other than the investment of money, or the furnishing of credit, or the bestowal of time or labor by the shareholder, for his own benefit, at the invitation of the Legislature. One who is invited, by charter, to embark in the enterprise of founding a college for the education of youth, or a museum for the preservation of articles of natural history or historic interest, a bank or an insurance company, furnishes to the Government no more consideration, nor of any very widely different kind,

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from that of the humble Chinese laborer, who now calls upon the United States to perform their promise that he may resume his *de facto* residence in California.

If, in the one case, the interest of the corporator is a franchise or liberty, such also is his. In principle, the two do not differ at all. Each is the bestowal of a special privilege by the Government upon a favored individual, who accepts its invitation, and furnishes the consideration nominated in the law. If one is contractual in character, such certainly is the other.

Mr. Madison, (Writings, Vol. 4, 478-480), held to the view that the citizen has not only a right to his property, but a property in all his rights.

Such must also be the case of a denizen. Whatever power Congress may have to exclude those who have never crossed our borders, cannot extend to persons admitted as residents of the commonwealth by implied or express legal license, and to whom therefore as "persons" within the jurisdiction of the United States, all the protection afforded by the Constitution to "persons" not citizens, can apply.

*Secondly.* Even if the departure of appellant from San Francisco were not so connected with the grant of the right to return that it must be treated as the consideration of a contract, nevertheless the legislative purpose manifested in the statute is plain and clear, to vest appellant with the right to re-enter the United States. The language of the treaty of 1881 was that,—

"Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord."

The statute, in its final form, as amended in 1884, after exempting—

"Chinese laborers who were in the United States on the 17th day of November, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of the Act of May 6th, 1882,"

from the exclusion of their class provided for in the *first* and *second* sections, proceeded, in the *fourth* section, to provide for the delivery to Chinese laborers about to embark from the United States by sea, of a certificate, one of the objects of which is described to be,

"to furnish * * * the proper evidence of * * * *right* to go from and come to the United States as provided by the said act and treaty between the United States and China."

The legal effect of the certificate is in the same section defined to be to "*entitle*":—this is the word used;—to

"*entitle* the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the Collector of Customs at the district at which such Chinese laborer shall seek to re-enter."

What language could the Congress of the United States, seeking to vest in Chinese laborers the right of re-entry have used, better adapted to the end than the sentences just quoted?

The word "*entitle*" was not loosely or idly adopted. It is a word of vesting, descriptive of an acquired condition, right or title. He who is "*entitled*" cannot be divested, except by the process of eminent domain or during a state of war. The language is, as we have already argued, characteristic of contractual relations,

but of executed, not executory, contractual relations. The United States, it is true, promise to allow the Chinese laborer to return. Whatever may be necessary for the Government to do *in futuro* may be executory, but his *title* to return is *in presenti*. That is to say, the act confers a vested right to return, using, for this purpose, the word "*right*" as well as "*entitle*."

In *Fletcher vs Peck*, 6 Cranch, 87, it was held that a grant is a contract executed. In the present case there is a grant—the grant, to a departing alien, of the freedom of the United States, of the right to repass their boundaries, and again incorporate himself in the mass of persons within the jurisdiction and under the protection of the Constitution and laws of our country.

The contract has been executed by him. True, he may never call for performance by the United States. But this is true of all contracts, which one party has executed, while the obligation of the other remains executory. His effort to return is not performance by him. It is his call upon, or demand of the United States that they perform.

In the motion to advance this case, our associates, Messrs. Brown and Riordan, made the following statement:

"The Chinese Consulate General, at this port, informs us that the property interests in this country of the Chinese laborers, whose right to return has been abrogated, amounts to several millions of dollars."

This, though not proved as a fact in the case, may fairly be referred to an illustrative possibility. But the case of the appellant does not depend on his riches or poverty. He is a "laborer," the constructor of

wealth, if not its possessor, and his "inalienable right" to the liberty of labor entitles him to the same judicial consideration, as if he were possessed of uncounted millions.

## III.

### Want of power to annul appellant's rights.

Whether treated as a contract executory, a contract executed, or a vested right, the "right," the title of Chae Chan Ping, the privilege, or favor, or franchise, or liberty, (whatever it may be called), to which he became "*entitled*" by force of the treaty, the statutes, his departure, the certificate, his re-entry and surrender of the certificate, is incapable of revocation by any act of the United States during time of peace with China.

Mr. Madison, in his report to the General Assembly of Virginia upon the Alien law, (Writings of James Madison, Vol. IV., page 526, ed. Lippincott, 1867; Virginia Report of 1799–1800, published in 1850, by J. W. Randolph, Richmond, Va., pp. 204–205), states the true rule thus:

"One argument offered in justification of this power exercised over aliens is, that the admission of them into the country being of favor, not of right, the favor is at all times revocable.

To this argument it might be answered that, allowing the truth of the inference, it would be no proof of what is required. A question would still occur, whether the Constitution had vested the discretionary power of admitting aliens in the Federal Government or in the State Governments.

But it cannot be a true inference, that, because the admission of an alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual may be of favor, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable. To admit an alien to naturalization is as much a favor as to admit him to reside in the country; yet it cannot be pretended that a person naturalized can be deprived of the benefits any more than a native citizen can be disfranchised."

The rule thus stated by Mr. Madison was enforced by this Court in the case of a grant of land, by the State of Georgia, in *Fletcher vs. Peck*, 6 Cranch, 87.

Chief Justice MARSHALL says, (page 135):

"Is the power of the Legislature competent to the annihilation of such title, and to a resumption of the property thus held? The principle asserted is, that one Legislature is competent to repeal any act which a former Legislature was competent to pass; and that one Legislature cannot abridge the powers of a succeeding Legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding Legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in its nature a contract, when absolute rights have vested under that contract a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

And again, (pages 136, 137):

"Is a grant a contract? A contract is a compact be-

tween two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which conveyance was made by the Governor. A contract executed is one in which the object of the contract is performed; and, this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always, estopped by his own grant."

The power of the United States to impair the obligation of a contract is not expressly denied in the Constitution. It was unnecessary that it should be, for the Constitution is a grant of enumerated powers only, including those incidental or implied only when necessary to the exercise of granted powers.

The reservation of the remaining or non-delegated powers to the States and the people was as fully established by the necessary implications of the Constitution, as afterwards by the express terms of the Tenth Amendment. The right to impair a contract is granted to the Government of the United States in the single case only of the adoption,

"of uniform laws on the subject of bankruptcies throughout the United States."

As the power to impair contracts would otherwise have been reserved to the States and the people, it was necessary to deny its exercise to the States. Therefore the power to impair a contract cannot be exercised by either the Federal or State Governments.

In the *Sinking Fund Cases*, 99 U. S., 710, Chief-Justice Waite, at page 718, says :

" The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the Constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

The language of the three dissenting Judges, (Strong, Bradley and Field, JJ.), to the same effect, to be found at pages 737, 745 and 764, has been quoted by our associates, Messrs. Brown and Riordan, and need not be repeated here.

If the guaranty of appellant's right to return to the United States contained in the treaty, statutes and certificate, be not considered as a right or title vested by contract, nevertheless it does not follow that it is revocable by act of Congress.

The irrevocability of Crown or Governmental grants,

even when made in the exercise of mere prerogative, or springing from motives of purely public policy, is established. Only the Judicial Department, and it not always, can annul them. .

Pardons and commutations are irrevocable, (*Knapp vs. Thomas*, 39 Ohio St., 377), except in States where the act of 27 Edward 3, Chap. 2, has been adopted as part of the common or statutory law, nor can they be annulled under that act, except by *scire facias*. What Mr. Justice Field, (*Ex parte Garland*, 4 Wall, 380), calls, "the benign prerogative of mercy,"

whether its exercise be the result of mere
"grace and mercy," or of
"justice, supported by a wise public policy,"

(*Knapp vs. Thomas*, 39 O. St., p. 381), is not sustained by any legal consideration, and certainly presents no such strong ground for denying the power of revocation to the legislative and executive departments of government, as the case at bar.

"The only authority competent to set a patent aside, or to annul it, is vested in the Judicial Department of the Government; and this can only be effected by proper proceedings taken in the Courts of the United States." *United States vs. American Bell Telephone Co.*, 128 U. S., 450.

The elaborate examinations of this subject made by this Court in the case of the *United States vs. American Bell Telephone Company*, and by the Supreme Court of Ohio in *Knapp vs. Thomas*, relieve us from the labor of further citation. The cases cited in the able and elaborate opinions of Mr. Justice Miller and Judge Okey, establish that the method of revoking revocable

Governmental grants, is by an appeal to the Judicial Department. That which Congress adopted in the present case, was borrowed from the despotic action to which kings were accustomed to resort in the rude and barbaric ages of the Plantagenets. Of this, Mr. Justice Miller says, in the Telephone case, 128 U. S., 459:

"Charters and patents authenticating grants of personal privileges were in the earlier days of the English Government made by the Crown. They were supposed to emanate directly from the King, and were not issued under any authority given by Acts of Parliament, nor were they regulated by any statutes. Being, therefore, in their origin an exercise of his personal perogative, the power of revoking them, so far as they could be revoked at all, was in the King and was exercised by him as a personal privilege. This mode of revoking patents, however, seems to have fallen into disuse, and the same end was attained by the issue of writs of *scire facias* in the name of the King to show cause why the patents should not be repealed or revoked."

Blackstone says, (I. Comm., 374), that—

"A denizen is an alien born, but who has obtained *ex donatione regis* letters patent to make him an English subject, a high and incommunicable branch of the royal prerogative."

As the common law is now, such letters patent can only be canceled by *scire facias*, and not thus even *ex post facto*, or for a cause, (*e. g.*, the offense of being a Chinese laborer), existing when the patent was issued. Can it be possible that the Congress of the United States may exercise a despotic power denied to the monarchs of England?

We submit that it is altogether too late in the day for Congress, under the grant of limited powers contained in the Federal Constitution, to resort

to the disused methods of canceling personal privileges conceded by monarchs. Congress is not the King, and does not grant personal privileges, (although it may provide for granting privileges to persons), so that this method of cancelling Crown grants, to which the Kings of England once resorted, but have so long disused that it has ceased to be one of their prerogatives, is wholly inapplicable to a Government of law and right. It is true that in *Spratt vs. Spratt*, 4 Peters, 393, the irrevocability of certificates of naturalization was established by this Court, Chief Justice MARSHALL pronouncing the opinion, on the ground that the act of naturalization is judicial, and therefore not to be impeached collaterally. Nevertheless, we submit that, had Congress seen fit to confide the work of naturalization to the Executive Department, as might well have been done, certificates of citizenship would have been, according to established principles, irrevocable, except by judicial act. Such certificate of citizenship would have been analogous to the "exclusive rights" conferred on authors and inventors, to land patents, to other executed grants of Government, to pardons and commutations, and charters granting franchises, as a fair, market, rectory or toll, and accepted charters of incorporation; in all of which cases it is established, as the authorities cited above show, that only judicial, if any power, can annul the Governmental act.

We have already directed attention to the fact that the effect of the judgment of the Circuit Court in this case was to banish or exile appellant. It may be contended that Congress possesses this power, and as the whole includes its parts, that this is a sufficient answer in this case, for the reason that if Chinese

laborers might be banished by act of Congress, their exclusion would not be unconstitutional, even if in breach of a contract to permit them to return: in other words, if their continued residence in the country after return, is subject to be terminated at any moment by an exiling act of Congress, that they cannot complain because such is the result of the present act. The power to return, even if secured by contract for which adequate consideration had been given, would undoubtedly be of little value, if the right to remain after returning depended upon the caprice or whim of a political majority in the Senate and House of Representatives, whose action might be concurred in by the President. The exercise of the power to expel or exile has been, in form at least, but once attempted in the history of the country, namely, in the passage of the "act concerning aliens," approved June 25, 1798, which by its terms expired two years from the date of its approval by President Adams. The first section, (*1 Statutes at Large, 570*), provided (italics in original):

"That it shall be lawful for the President of the United States at any time during the continuance of this act, to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the Government thereof, to depart out of the territory of the United States."

By other provisions, power was given to the President of the United States to license aliens ordered to depart, so as to allow them to remain, and the alien ordered to depart but not departing, was liable if not so licensed, upon conviction, to imprisonment not ex-

ceeding three years, and could never thereafter become a citizen of the United States.

The short term limited by the act itself, and possibly the omission to execute its provisions because of its extreme unpopularity, or doubts of its unconstitutionality, prevented this act ever receiving judicial consideration. Mr. Justice STORY, in his work on the Constitution, Sec. 1294, expresses no opinion on the subject. John C. Calhoun, while Vice-President, writing August 28, 1832, to Governor Hamilton, spoke of the unconstitutionality of the Alien and Sedition laws as "settled," an opinion vigorously controverted by Judge COOLEY in a note to the section in his edition of Story on the Constitution.

Dr. Von Holst, in a note to page 40 in his work on the Constitutional Law of the United States, speaking of the doctrine of State Sovereignty, says:

"The doctrine in its beginnings goes back to the last years of the eighteenth century. The hated Alien and Sedition laws, whose unconstitutionality will scarcely be questioned by any one to-day, gave the Legislatures of Virginia and Kentucky the opportunity to proclaim the doctrine officially."

This power will hardly be claimed as sanctioned by contemporary construction. The Alien law was at once assailed on the ground of unconstitutionality as well as inexpediency, and its extreme unpopularity was one of the causes of a political revolution, which, but for the fact of slavery, and the use made of the heresy of nullification in the assaults upon the Alien and Sedition laws, might perhaps have remained unchecked until to-day.

The Kentucky resolutions of 1798 were written by

Thomas Jefferson, and transmitted through Wilson Cary Nicholas and George Nicholas to John Breckenridge, (afterwards, 1805–7, Attorney-General of the U. S.,) who presented them, making some changes not important in the present discussion, to the Legislature of Kentucky. The *fourth* of these, in its original form, is to be found at page 466 of volume 9, (ed. Riker, Thorne & Co., 1854), of the writings of Thomas Jefferson, as follows:

"*Resolved*, that alien friends are under the jurisdiction and protection of the laws of the State wherein they are: that no power over them has been delegated to the United States, nor prohibited to the individual States, distinct from their power over citizens. And it being true as a general principle, and one of the amendments to the Constitution having also declared, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people," the act of the Congress of the United States, passed the——day of July, 1798, intitutled "An Act concerning Aliens," which assumed power over alien friends not delegated by the Constitution, is not law, but is altogether void, and of no force."

This resolution, in the form in which it was first cast by the pen of Thomas Jefferson, except that the word "entitled" was substituted for "intitutled," and "22nd day of June," for "—day of July," was adopted, (two votes only to the contrary), by the House of Representatives of Kentucky, November 10th, 1798, by the Senate unanimously, November 13, 1798, followed by the approval of Governor Garrard. It is an interesting fact that its passage is authenticated by the signature of Thomas Todd, Clerk of the House of Representatives, who for fifteen consecutive years from the organization of the State Government filled that office,

who shared the constitutional opinions of the members, and who, (appointed by President Jefferson in 1807), was the first, and, until his death in 1826, the only Justice of this Court residing west of the Alleghanies.

The Virginia resolutions of 1798, written by James Madison, and proposed by John Taylor of Caroline, (Vol. IV., Elliot's Debates, p. 528), contain the following passage:

"That the General Assembly doth particularly PROTEST against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition acts,' passed at the last session of Congress, the first of which exercises powers nowhere delegated to the Federal Government, * * * * * *"

In the address of the General Assembly of Virginia, *Ibid.*, p. 531, which accompanied the Resolutions of 1798, it is said that—

"all the preceding arguments arising from a deficiency of constitutional power in Congress, apply to the Alien Act; and this act is liable to other objections peculiar to itself. If a suspicion that aliens are dangerous, constitute the justification of that power exercised over them by Congress, then a similar suspicion will justify the exercise of a similar power over natives; because there is nothing in the Constitution distinguishing between the power of a State to permit the residence of natives and aliens. It is, therefore, a right originally possessed, and never surrendered by the original States and which is rendered dear and valuable to Virginia, because it is assailed through the bosom of the Constitution, and because her peculiar situation renders the easy admission of artisans and laborers an interest of vast importance.'

The Kentucky resolutions were communicated to all the States, and met with adverse responses from several. Most of these placed their objection to the

resolutions upon the ground that final judgment on questions of constitutionality is committed by the Constitution to this Court, and not to the State Legislatures. In two instances, however, (Massachusetts and New Hampshire), attempts were made to present arguments in favor of the constitutionality of the alien and sedition laws. The character of these responses is such as to make them important in the present discussion, for they support the alien law almost if not entirely by reference to war powers. The Legislature of Massachusetts, on February 13th, 1799, adopted a response to Virginia, from which we make the following quotation, being all which relates to the alien law:

"The Legislature of Massachusetts, although they do not themselves claim the right, nor admit the authority, of any of the State Governments to decide upon the constitutionality of the acts of the federal government, still, lest their silence should be construed into disapprobation, or at best into a doubt of the constitutionality of the acts referred to by the State of Virginia; and, as the General Assembly of Virginia has called for an expression of their sentiments, do explicitly declare, that they consider the Acts of Congress, commonly called the 'Alien and Sedition Acts' not only constitutional, but expedient and necessary; that the former act respects a description of persons whose rights were not particularly contemplated in the Constitution of the United States, who are entitled only to a temporary protection, while they yield a temporary allegiance; a protection which ought to be withdrawn, whenever they become dangerous to the public safety, or are found guilty of treasonable machination against the Government; that Congress, having been especially entrusted by the people with the general defense of the nation, had not only the right but were bound to protect it against internal, as well as external foes.

That the United States, at the time of passing the act concerning aliens, were threatened with actual invasion, had been driven, by the unjust

and ambitious conduct of the French Government into warlike preparations, expensive and burdensome, and had then, within the bosom of the country, thousands of aliens, who, we doubt not, were ready to co-operate in any external attack.

It cannot be seriously believed that the United States should have waited till the poignard had in fact been plunged. The removal of aliens is the usual preliminary of hostility, and is justified by the invariable usages of nations. Actual hostility had unhappily long been experienced, and a formal declaration of it the Government had reason daily to expect. The law therefore was just and salutary, and no officer could, with so much propriety be entrusted with the execution of it, as the one in whom the Constitution has reposed the executive power of the United States."

The Legislature of New Hampshire, on June 15th, 1799, took the same ground, by adopting the views of the minority of the Virginia Legislature. We quote from this response, as follows, (italics ours) :

"That if the Legislature of New Hampshire, for mere speculative purposes, were to express an opinion on the acts of the General Government, commonly called the 'Alien and Sedition Bills,' that opinion would unreservedly be that those acts are constitutional *and in the present critical situation of our country*, highly expedient.

That the constitutionality and expediency of the acts aforesaid have been very ably advocated and clearly demonstrated by many citizens of the United States, *more especially by the minority of the General Assembly of Virginia.*"

It must be remembered that the alien law did not authorize the President to order the removal of all aliens, but of two classes only, namely, those he might—

"judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machination against the Government."

The order of the President, in the execution of this

act, therefore, being directed against dangerous or hostile aliens only, was itself an act of war or *quasi*-war.

The debate on the Virginia resolutions was reprinted at Richmond, in 1850, by J. W. Randolph, in a small volume entitled:

"The Virginia Report of 1799–1800, touching the Alien and Sedition Laws; together with the Virginia Resolutions of December 21, 1798, the debate and proceedings thereon in the House of Delegates of Virginia, and several of their documents illustrative of the report and resolutions."

We make the following extracts from the arguments of the leaders of the minority referred to in the resolutions of the New Hampshire Legislature, viz.: George Keith Taylor, of Prince George; General Henry Lee, of Westmoreland, ("Lighthorse Harry"), William Cowan, of Lunenburg, and Archibald Magill, of Frederick. These gentlemen relied mainly upon the war powers of the Federal Government. Mr. Taylor, their leader, argued, (page 30), that aliens come into any country by permission, not right. After quoting Vattel, page 100, Section 231, and Blackstone's Commentaries, Vol. 1, page 259, to show that by the law of nations, (italics in the original), he added,

"It is left in the power of all States to take such measures about the admission of strangers as they think convenient; that so long as their nation continued at peace with that in which they resided, and that they behaved themselves peaceably, they were under the protection of the government of that nation, though liable to be sent or ordered away, whenever that government saw occasion, or its safety required it. If there were nothing then, he said, in the Constitution of the United States, respecting the migration of persons, the doctrine of the law of nations, which he had

read, was sound, and the General Government might by that lawfully restrain or regulate the entry of aliens, and order them away if necessary" (p. 31).

He quoted the first clause of the ninth section of the first article of the Constitution, viz.: that Congress shall not prohibit, before 1808,

"The migration or importation of such persons as any of the States now existing shall think proper to admit,"

and admitted that—

"The clause read, then, took away from Congress the right of prohibiting migration within a limited time. But though the *entry* was prevented, the question then recurred, was their *removal when dangerous* prevented also?"

Upon this he argued thus—

"By the general law of nations he said the admission of aliens into a country was altogether a matter of grace. They might therefore be removed by the government of the country, whenever it was deemed necessary. If the General Government, then, possessed not the power of removal, one great mischief of a general nature, which it was intended to remedy, would remain as before."

He called attention to the situation of America and France at the time of the passage of the alien law, saying:

"It was true there was no declaration of war between them, but they were not at peace. He enumerated their various acts of hostility towards us, and then asked if there was no danger to be apprehended from aliens of that county. He himself thought there was. He related, also, the numerous designs and machinations which they had been contriving against us. He deemed it therefore highly necessary that the General Government, established for general benefit and common protection, should possess the power of removing them. But, if the law of Congress were to be construed

unconstitutional, the General Government could not remove them."

He continued his argument, deriving the power to pass the act in question, (page 32), from the preamble to the Constitution—

"That, he said, declared the Constitution to be formed in order to form a more perfect union, establish justice, insure domestic *tranquility*, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity. The passage of an alien law then, he said was justifiable for the purpose of answering the four great ends last mentioned in the preamble, which showed the object and intention of the Constitution. But he said there was something in it more positive. He called their attention to that clause in the enumeration of the powers of Congress 'to define and punish piracies and felonies committed on the high seas, and *against the law of nations*,' and said aliens were within it, since for an alien to conspire against the peace of the nation, which permitted him a residence therein, was an offense against the law of nations. He further read the clause declaring that the United States would guarantee to the several States a republican form of government, and *protect each of them against invasion*. He relied much upon the term *protect* used in that clause. Protection, he said, was a preventing, a guarding against. * * * A law sending away dangerous aliens was a cautionary law, tending to *protect* the States. * * * But such a law must always be temporary. It could not be permanent. It could continue only so long as danger existed. It would effect only dangerous persons. Aliens could only be dangerous in times, of war, or in times verging towards war. In times of safety such a law would be unnecessary and improper. He agreed, therefore, that a permanent law of that kind including all aliens, passed before 1808, would be unconstitutional; since it might actually defeat the 9th section. But that a temporary law passed only for the purpose of ordering away *dangerous aliens*, was a law of *protection to* the States.

On another day, Mr. Taylor again argued in defense

of the constitutionality of the alien law, under the powers to call forth the militia, to suppress insurrections and repel invasions, and to protect each State against invasion and domestic violence, urging that, (p. 131):

"Protection necessarily implies and includes the *prevention* of mischief and danger. In protecting the States, then, against invasion, Congress must use the means of *preventing* the evil; and the clause before recited gives them in express terms the power to make all laws necessary and proper for carrying into execution any power vested in them by the Constitution. Congress then foresaw, from the dispute existing between the United States and France, that war might be the probable result, and that invasion might be the consequence of war. To protect the States against this invasion, a proper measure appeared to be the exclusion of dangerous aliens. They were vested by the Constitution with power to pass all laws necessary and proper to *protect* the States against invasion, and they therefore constitutionally passed the alien-law."

Mr. Magill argued, (page 73), that:

"When the alien law had passed, there was good cause to apprehend danger from without, and from aliens within our territory; to guard against their attempts was proper."

Mr. Cowan, (page 101), argued that:

"By the Constitution, a power was given to Congress to repel, and to protect against invasion, and to make any law to carry its measures into effect. What could be the meaning, then, of those clauses? The terms, to *repel* the invasion, and *protect* against invasion, give different powers. Could it be thought proper, that the General Government should have no power to defeat a plan before it was matured? It must be inferred, then, from such words, that Congress had the power to take such measures as would secure the people."

General Lee argued, (page 105), that:

"The law was in its nature preventive, and sprung from

the right of duty of Government to protect the States from invasion. The exercise of this right belonged to Congress, and they were the sole judges of the expediency. In their decision, all ought to acquiesce. * * * During the debate, it had been well observed by the worthy member from Lunenburg, that the injustice of France might be considered as the *root* of these measures, and that it was not easy to discuss the latter, without reference to the former. This remark was certainly true, and must have been felt by every gentleman engaged in the discussion. In case of an invasion, a measure, dependent only on its practicability, of which practicability our venomous and insatiable foe was the sole judge, what keen and operative aid might not be afforded by the numerous aliens, long fostered by American hospitality, and anxious for an opportunity to display their ingratitude, if we might be permitted to form an opinion of their future conduct by the zeal with which they labored to expel from the breasts of our citizens all respect for religion and government; preparing, as far as was in their power, the American people for the reaction of the French and Saint Domingo tragedies."

On another day, General Lee,(page 154) :

"As to the alien and sedition laws, * * contended that the only *real view* in passing them, was to protect us from foreign invasion."

At the next session of the Virginia Legislature, the resolutions of 1798 were sustained in an elaborate report, (occupying pages 189-233 of the pamphlet already referred to, and being the same report from which we have already quoted, *ante*, pp. 37, 38). This report was written by James Madison. With regard to the alien law, the position of its eminent author and of the majority of the Legislature which adopted the report, is stated at page 203, thus :

"With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the

Constitution having expressly delegated to Congress the power to declare war against any nation, and, of course, to treat it and all its members as enemies. With respect to aliens who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the Act of Congress is denied to be constitutional; and it is, accordingly, against this act that the protest of the General Assembly is expressly and exclusively directed. A third observation is, that were it admitted, as is contended, that the 'act concerning aliens' has for its object not a *penal*, but a *preventive* justice, it would still remain to be proved that it comes within the constitutional power of the federal legislature, and if within its power that the legislature has exercised it in a constitutional manner. * * * But, in the last place, it can never be admitted, that the removal of aliens, authorized by the act, is to be considered, not as punishment for an offense, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited, as the asylum most auspicious to his happiness; a country where he may have formed the most tender of connections, where he may have vested his entire property, and acquired property of the real and permanent, as well as the movable and temporary kind; where he enjoys under the laws a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for, and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war, and of unusual licentiousness on that element, and possibly to vindictive purposes which his emigration itself may have provoked; if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. * * * Again, it is said, that aliens not being parties to the Constitution, the rights and privileges which it secures cannot be at all claimed by them.

To this reasoning also, it might be answered, that although aliens are not parties to the Constitution, it does not follow that the Constitution has vested in Congress an absolute power over them. The

parties to the Constitution may have granted, or retained, or modified the power over aliens, without regard to that particular consideration.

But a more direct reply is, that it does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet, it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled in return to their protection and advantage. * * * It is said, further, that by the law and practice of nations, aliens may be removed at discretion for offenses against the law of nations; that Congress are authorized to define and punish such offenses; and that to be dangerous to the peace of society is, in aliens, one of those offenses.

The distinction between alien enemies and alien friends is a clear and conclusive answer to this argument. Alien enemies are under the law of nations, and liable to be punished for offenses against it. Alien friends, except in the single case of public ministers, are under the municipal law, and must be tried and punished according to that law only. This argument also, by referring the alien act to the power of Congress to define and *punish* offenses against the law of nations, yields the point that the act is of a *penal*, not merely of a preventive operation. It must, in truth, be so considered. And if it be a penal act, the punishment it inflicts must be justified by some offense that deserves it."

Mr. Madison argues at length that alien friends cannot be punished except for their own offenses, not for offenses committed by the nation of which they make part; that the alien act is not agreeable to the general practice of nations, which authorizes the expulsion of alien enemies, not alien friends; that it is not sustainable by the power of Congress to grant letters of marque and reprisal, because,

"It must be considered as an abuse of words to call

the removal of persons from a country, a seizure or reprisal on them;"

and that the right of removing aliens is not incident to the war powers vested in Congress by the Constitution, because,

"The removal of alien enemies is an incident to the power of war; that the removal of alien friends, is not an incident to the power of war. It is said, that Congress are by the Constitution to protect each State against invasion; and that the means of *preventing* invasion are included in the power of protection against it. * * * Invasion is an operation of war. To protect against invasion is an exercise of the power of war. A power, therefore, not incident to war, cannot be incident to a particular modification of war. And as the removal of alien friends, has appeared to be no incident to a general state of war, it cannot be incident to a partial state, or a particular modification of war. Nor can it ever be granted, that a power to act on a case when it actually occurs, includes a power over all the means that may *tend to prevent* the occurrence of the case."

Extracts from the debates in the Virginia legislature, and from the report of Mr. Madison, might be extended much further, but it is believed to be unnecessary.

At the date of the passage of the "Alien law," war with France was imminent. On July 6th, 1798,

"An Act respecting Alien Enemies,"

was approved by President Adams, and became and still is the law of the land, (1 St. at L., 577; Rev. St., Sections, 4067–4070). The first Section of this act begins with these words:

"That whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion shall be perpetrated, attempted or threatened against the

territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies."

The same section further provides that the President shall be authorized in his proclamation to direct,

"the conduct to be observed on the part of the United States, towards the aliens who become so liable. The manner and degree of the restraint to which they shall be subject, and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those, who, not being permitted to reside within the United States, shall refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety."

The next section provides for granting time for removal, (as may be fixed by treaty, or, in the absence of treaty-provisions, as may be reasonable), and for the removal from the United States of resident aliens, (with their property), who may be charged with actual hostility or other crimes against public safety. The second and other sections of this act confer power on the Courts of the United States, and the marshals of the several districts to execute its provisions.

Whatever may have been true of "the act concerning aliens," commonly called the "Alien act," the statute last referred to was undoubtedly originally passed in the exercise of the war powers of the United States, with a view to preparation for actual hostilities with France. It has been continued in force, as a

measure of prudent precaution, to meet the danger of hostilities with other nations.

It was followed by an act, approved July 7th, 1798, "to declare the treaties heretofore concluded with France no longer obligatory on the United States," (1 Stat. at Large, 578),

and on July 9, 1798, (Do., 578), by an act authorizing the capture and forfeiture of armed French vessels of war by public armed vessels of the United States; also providing for commissioning privateers for the same purpose.

The grounds upon which the constitutionality of the alien law was sustained at the time are futher shown by the report of the select committee of the House of Representatives, consisting of Chauncey Goodrich, of Connecticut, (Chairman), Thomas Pinckney, of South Carolina, John Nicholas, of Virginia, William Craik, of Maryland, and Thomas Hartley, of Pennsylvania, (to whom had been referred numerous petitions praying for the repeal of the alien and sedition laws), made to the House of Representatives, February 21, 1799.

This report, with the argument of Albert Gallatin in reply, is contained in the third volume of the "Annals of Congress," beginning at page 2986.

From the report we make the following extracts:

"It is contended that Congress have no power to pass a law for removing aliens.

To this it is answered, that the asylum given by a nation to foreigners, is mere matter of favor, resumable at the public will. On this point, abundant authorities might be adduced, but the common practice of nations attests the principle.

The right of removing aliens, as an incident to the power of war and peace, according to the theory of the

Constitution, belongs to the Government of the United States. By the Fourth Section of the Fourth Article of the Constitution, Congress is required to protect each State from invasion, and is invested by the Eighth Section of the Fifth Article, with power to make all laws, which shall be proper to carry into effect all powers vested by the Constitution in the Government of the United States, or in any department, or officer thereof; and to remove from the country, in times of hostility, dangerous aliens, who may be employed in preparing the way for invasion, is a measure necessary for the purpose of preventing invasion, and of course, a measure that Congress is empowered to adopt."

The Committee then proceed to answer the argument against constitutionality, founded on the *ninth* section of the *first* article of the Constitution, arguing,

*First*, that this provision relates only to the importation of slaves; and

"*Secondly.* It is answered, that to prevent emigration in general, is a very different thing from sending off, after their arrival, such emigrants as might abuse the indulgence, by rendering themselves dangerous to the peace or safety of the country, and that if the Constitution in this particular should be so construed, it would prevent Congress from driving a body of armed men from this country, who might land with views evidently hostile.

*Thirdly.* That as the Constitution has given to the States no power to remove aliens during the period of the limitation under consideration, in the meantime on the construction assumed, there would be no authority in the country empowered to send away dangerous aliens, which cannot be admitted; and that on a supposition the aforesaid restrictive clause included every description of emigrants, the different sections must receive such a construction as shall reconcile them with each other; and according to a fair interpretation of the different parts of the Constitution, the section cannot be considered as restrictive on the power of Congress to send away dangerous foreigners in times of threatened or actual hostility. And though the United States, at the time of passing this act, were not in a state of declared war, they were in a state of partial

hostility, and had power, by law, to provide, as by this act they have done, for removing dangerous aliens."

The question whether the "Alien act" was, in fact, and in view of the acts last quoted, a war measure, and defensible under the war powers of the Federal Government is now one of historic interest only. If it were a war measure—if it were, being such, sustainable as not in conflict with the Constitution—it presents no precedent for the legislation employed for the banishment of Chae Chan Ping. There is no war with China. None is threatened or apprehended. The Exclusion act was passed with reference to no such possibility, even remote. No Chinese laborer is "dangerous to the peace and safety of the United States;" none is engaged in "treasonable or secret machinations against the Government." "Chinese cheap labor" is the only dangerous machination this harmless, amiable and useful person is guilty of, or purposes to "ruin" this country with.

If the constitutionality of the "Alien act" could only be maintained, as attempted in Massachusetts and Virginia, by reference to the war powers of the Government, then it is clear that the Exclusion act, being passed and intended to operate during peace with China, must find some support elsewhere than in the history of the "Alien act" of 1798.

The fact that the statesmen and jurists of the Federal party, living so soon after the formation of the Constitution, defended that measure only by reference to war powers, is cogently persuasive to the conclusion that the Exclusion act is, in its application to outstanding certificates, unconstitutional, and should be so declared by this Court.

## IV.

### Residence of Chae Chan Ping.

Chae Chan Ping is a Chinese laborer, a subject of the Emperor of China, not a citizen of the United States of America. Nevertheless, he is a "person," and, as such, within the protection of the *fifth* amendment to the Constitution of the United States:

"No person * * * shall be deprived of life, liberty or property without due process of law,"

and of the *fourteenth* amendment to the Constitution of the United States:

"Nor shall any State deprive any person of life, liberty or property without due process of law."

Chae Chan Ping is a resident of the State of California; his domicile is there, not elsewhere. Judge COOLEY says, (Constitutional Limitations, side page 600):

"A person's residence is the place of his domicile or the place where his habitation is fixed without any present intention of removing therefrom. * * * Every person, at all times, must be considered as having a domicile somewhere, and that which he has acquired at one place is considered as continuing until another is acquired at a different place. * * * Temporary absence from one's home with continuous intention to return, will not deprive one of his residence, even though it extend through a series of years."

Dr. Woolsey says, (International Law, 5th ed., Sec. 71):

"And when once domicile is acquired, it is not shaken off by occasional absence for the sake of business or pleasure, or even by visits to a former domicile, or to one's native country."

And Judge STORY, (Conflict of Laws, Sec. 41) says:

"By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives, or has his home. In this sense, the place where a person has his actual residence, inhabitancy or commorancy, is sometimes called his domicile. In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning, *(animus revertendi)*."

In Section 46, the author treats of the—

"acquisition and change of domicile,"

and classifies the legal propositions governing the same into rules, part of which we quote:

"*Thirteenthly.* Residence in a place, to produce a change of domicile, must be voluntary. If, therefore, it be constraint or involuntary, as by banishment, arrest or imprisonment, the antecedent domicile of the party remains."

This establishes that, notwithstanding his banishment by the judgment of the Circuit Court, Chae Chan Ping even now retains his domicile in California.

"*Fourteenthly.* The mere intention to acquire a new domicile, without the fact of an actual removal, avails nothing; neither does the fact of removal without the intention. * * *

*Sixteenthly.* A domicile once acquired remains until a new one is acquired. It is sometimes laid down that a person may be without any domicile; as if he quits a place with an intent to fix in another place, it has been said that while he is *in transitu* he has no domicile. * * * But the more correct principle would seem to be, that the original domicil is not gone until a new one has been actually acquired, *facto et animo*.

*Seventeenthly.* If a man has acquired a new domicil different from that of his birth, and he removes from it with an intention to resume his native domicile, the latter is reacquired, even while he is on his way, *in*

*itinere*, for it reverts from the moment the other is given up."

This *seventeenth* rule of Judge STORY has no application to this case, for want of testimony of any intention of Chae Chan Ping to resume his native domicile. The proof is the other way. Inasmuch as upon leaving San Francisco, he took the trouble to procure a certificate of " right " to return, which " entitled " him to resume his acquired residence *de facto*, the reasonable presumption is that he then intended to return, and not to " resume his native domicile."

That San Francisco, California, is the place of domicile or residence of Chae Chan Ping is proved by the Record in this case. It is named as his—

"last place of residence,"

(in which he had continuously in fact resided, following his occupation as laborer for twelve years prior to June 2d, 1887), in the certificate furnished him by the Collector of Customs of the Port of San Francisco, on the occasion of his departure for China, for the purpose of entitling him to return to the United States. This being the object of the certificate, as stated on its face, and defined in the act of Congress, under which it was issued, there could be no stronger evidence that Chae Chan Ping left the United States *animo revertendi*, which purpose he was endeavoring to effect when he embarked at Hong Kong on the steamer " Belgic " for San Francisco, and in fact completed, (as far at least as any action of his could), when he reached the latter port six days after the passage of the Exclusion act.

We, therefore, conclude that all the protection

afforded to the life, liberty and property of an alien resident of the United States, as a "person," contemplated and referred to in the *fifth* and *fourteenth* amendments of the Federal Constitution, belonged to Chae Chan Ping, when the steamer "Belgic" entered the harbor of San Francisco on the 7th day of October, 1888, and he once more resumed, (or attempted to resume), his actual residence in that city. In legal contemplation he had remained a resident of San Francisco, California, during his temporary absence, viz., from the second day of June, 1887, to the seventh day of October, 1888. In point of fact, he resumed, (as far as he could), his residence, changing it from a residence *de jure* to one *de facto*, the moment the steamer "Belgic" entered the port of San Francisco, and came within the jurisdiction of the Courts of the United States, reaching soil upon which their writ of *habeas corpus* might lawfully be served, and their judgments of deliverance executed. We do not claim that, because Chae Chan Ping had already reached California soil, when the Collector refused to permit him to land, he thereby acquired greater or other rights than those of other certificate holders, who, like him, had left the United States with the intention of returning. Such exclusion is, in effect, banishment, or exile, in the case of every Chinese laborer legally resident in the United States, although, at the time of the passage of the act, he may be temporarily absent, even on a visit to his native country. For it deprives the certificate holder of his domicile; which is nothing but expulsion under another name. This case, therefore, involves the rights of all certificate holders who, after leaving the United States, have not acquired

residence elsewhere. And any one of them can easily reach our borders, so as to make the facts of the present case his own, except that appellant was in fact *en voyage* in return to his home at the date of the passage of the Exclusion act.

## V.

### Expulsion of Chinese laborers not the exercise of police powers.

Such expulsion, whether at the time of the passage of the law, the Chinese laborer were or not actually within the country, is the confiscation of his domicile, (without compensation). If he were actually within the country, then he is *de facto* expelled. If, having acquired a legal domicile or residence under the invitations of the treaties, but being temporarily absent at the time of the passage of the act, he be not personally expelled, but only prevented from returning, then the effect of the act is, in addition to his personal exclusion, to deprive him of the residence which he had lawfully acquired. By this process he is at once deprived both of liberty and property, for his domicile—his legal right to residence—is property.

It is not material, however, to continue the discussion whether his domicile be property or not. He is effectually deprived of his liberty by being robbed of his legal domicile, and this is as clearly forbidden to be done by the United States, by the *Fifth* Amendment, and by any State, by the *Fourteenth* Amendment, as the confiscation of his tangible property or other choses in action.

The exclusion of Chinese laborers not legally domiciled within the United States, in other words, the power to refuse their admittance into the country, they having no residence or other previously acquired rights of any kind here, must be sustained, if at all, under the power

"to regulate commerce with foreign nations and among the several States and with the Indian tribes."

But it needs but little argument to show that the expulsion of a resident Chinese laborer, or the exclusion from his legal domicile of a resident Chinese laborer temporarily absent on a visit to his native land or elsewhere, is not a regulation of commerce. If it be such, then why is it not competent for Congress, under the power to regulate commerce between the States, to forbid the emigration of domiciled Chinese laborers, or other alien residents, from the State in which they are domiciled, or from one State to another? The answer is twofold: *First*, such a law would not be a regulation of commerce; and, *secondly*, it would deprive its victims of liberty and property "without due process of law," contrary to the *Fifth* Amendment to the Constitution.

In *Munn vs. Illinois*, 94 U. S., 142, Mr. Justice FIELD, speaking of the *Fourteenth* Amendment, and of course of the same language included in the *Fifth* Amendment, says:

"By the term 'liberty,' as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment."

The deprivation of "liberty," which the *Fifth* and *Fourteenth* Amendments of the Federal Constitution permit, when sanctioned "by due process of law," can only be defended in cases in which the "due process of law" is—

"a legitimate exertion of the police powers of the State." (*Mugler vs. Kansas*, 123 U. S., 661).

But it is manifest that the expulsion of Chinese laborers cannot be the exercise of police powers, for they are reserved by the States, not confided to the Federal Government.

In *Barbier vs. Connolly*, 113 U. S., at p. 31, Mr. Justice FIELD, reporting the unanimous opinion of the Court, announces that,

"The *Fourteenth* Amendment * * * undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcements of contracts; that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Of course, the same is true of the same language in the *Fifth* Amendment.

To this it is to be added that—

"the protection of the public health, the public morals and the public safety,"

in other words, the exercise of police powers is committed, not to the United States, but to the States.

*Mayor, Aldermen and Commonalty of the City of New York vs. Miln*, 11 Peters, 102, 139.
*United States vs. Cruikshank*, 92 U. S., 542.
*Presser vs. Illinois*, 116 U. S., 266.

The United States may exercise police powers within the District of Columbia and the Territories, but not in the States.

## VI.

### Appellant's expulsion an ex post facto attainder.

Article 1, Section 9 of the Constitution expressly forbids the banishment, or even exclusion, of appellant. It provides that——

"No bill of attainder or *ex post facto* law shall be passed."

The language of Magna Charta is :

"No freeman shall be taken or imprisoned or disseized of his freehold or his liberties * * * nor be outlawed or exiled * * * unless by the legal judgment of his peers or the law of the land."

Lord COKE asserts that the meaning universally attributed to the words,—

"Law of the land,"

at the time of Magna Charta, and since, was—

"Due process of law and the presentment or indictment of good and lawful men and being brought to answer thereto by due process of law."

Mr. Webster, in the Dartmouth College case, asked,

"Are then these acts of the Legislature which affect only particular persons and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone. 'And first it, (*i. e.*, the law), is a *rule:* not a transient, sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal. Therefore a particular act of the Legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter the idea of a municipal law; for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law.'" (Webster's Works, Vol. 5, p. 487, ed., Little, Brown & Co., 1857.)

In *Dauphin vs. Key*, McArthur & McKay, 203, it is said, (at page 226), that—

"The terms, 'due process of law,' as employed in the Constitution applies only to the fundamental rights referred to in that instrument and is inapplicable to mere privileges of legislative creations. As to these, the law of England furnishes no precedent, but the law of their creation determines the terms and conditions of their enjoyment and by what process they shall terminate."

At page 217, Judge Cox says:

"The rights to life, liberty and property are not the creature of legislation or of the Constitution, but they are recognized by the Constitution as rights already in existence which it seeks to protect from legislative encroachment. The Declaration of Independence asserts that men are endowed *by their Creator* with certain *in-*

*alienable rights;* that among these are life, liberty and the pursuit of happiness; that to secure these rights Governments are instituted among men. The right to liberty and the pursuit of happiness includes the right to acquire and enjoy property. These are the rights then—fundamental, natural, and ante-dating all Constitutions—which this amendment—[the Fifth Amendment to the Federal Constitution]—was designed to protect. To deprive of these would be punishment, except when property is taken in the exercise of the right of eminent domain."

Judge HARE says, (1 Am. Const. Law, 550):

"The definition of a bill of attainder would seem to be a law inflicting punishment directly, without the intervention of a Court."

Our contention is that the banishment or exclusion of appellant, he being domiciled in California as already shown, is in the nature of punishment for a supposed past offense, viz., that of having been a Chinese laborer, and that the exclusion act is as to him therefore an *ex post facto* bill of attainder forbidden by the Constitution.

That such banishment or exclusion is punishment was claimed by Mr. Madison in his report to the Virginia Legislature, (*ante*, p. 55), that it is punishment, in the nature of attainder, has been established by the decisions of this Court.

In *Cummings vs. State*, 4 Wall., 277, Mr. Justice FIELD reported the opinion of the majority of the Court. It had been argued by the counsel of the State of Missouri that;

"To punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all."

Answering this proposition, Mr. Justice FIELD says, (pages 320, *et seq.*):

"The deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust or from the privilege of appearing in the Courts or acting as an executor, administrator or guardian, may also and often has been imposed as punishment. * * * 'Some punishments,' says BLACKSTONE, 'consist in exile or banishment by abjuration of the realm or transportation, others in loss of liberty by perpetual or temporary imprisonment.' * * * (page 321). The theory upon which our political institutions rest is, that all men have certain inalienable rights, that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. Punishment not being, therefore, restricted, as contended by counsel, to the deprivation of life, liberty or property, but also embracing deprivation or suspension of political or civil rights, and the disabilities prescribed by the provisions of the Missouri Constitution being, in effect punishment, we proceed to consider whether there is any inhibition in the Constitution of the United States against their enforcement * * * (page 322). 'No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution bills of attainder include bills of pains and penalties" (page 323).

Mr. Justice FIELD refers, (page 324), by way of illustration, to the attainder of the Earl of Clarendon,

by Parliament in the reign of Charles the Second, which enacted that,

"The Earl should suffer perpetual exile, and be forever banished from the realm; and that if he returned or was found in England, or in any of other of the king's dominions after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect." (6 Howells' State Trials, page 391).

A more recent example of attainder is that of Bishop Atterbury, the title of which is,

"An act to inflict pains and penalties on Francis, Lord Bishop of Rochester." (15 Brit. Stats. at Large, 68).

This act provides that,

"The said Francis, Lord Bishop of Rochester * * * from henceforth forever * * * shall do and suffer perpetual exile and be forever banished this realm and all other his Majesty's dominions, and shall depart out of the same on or before the five and twentieth day of June, one thousand seven hundred and twenty-three."

The case of *Cummings* was that of a Catholic priest, deprived of the right to exercise his clerical functions by the Constitution of Missouri.

*Ex parte Garland* was the case of Attorney-General Garland, deprived of the right to practice law. In the latter case, at 4 Wall., 377, Mr. Justice FIELD, again reporting the opinion of the majority of the Court, says:

"The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the Courts of the United States. As the oath prescribed

cannot be taken by these parties, the act, as against them operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct, can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the Constitutional inhibition against the passage of bills of attainder, under which general designation they are included."

See also *Pierce vs. Carskadon*, 16 Wall., 234.

In *Blair vs. Ridgely*, 41 Mo., 63, the right of the State of Missouri to disfranchise General Francis P. Blair was in question. At page 172, Judge WAGNER, pronouncing the opinion of the Court, says:

"There are certain rights which inhere in and attach to the person and of which he cannot be deprived except by forfeiture for crime whereof he must first be convicted according to due process of law. These are termed natural or absolute rights. Blackstone says: 'By the absolute rights of individuals we mean those which are so in their primary and strictest sense; which would belong to their persons merely in a state of nature and which every man is entitled to enjoy whether out of society or in it." These rights may be arranged under the following heads: 1. The right of personal security; 2. The right of personal liberty, and 3. The right to acquire and enjoy property. To these the distinguished commentator on American law has added a fourth head which found no place under the English system, viz: The free exercise and enjoyment of religious profession and worship."

It is obvious that if the *Cummings, Garland* and *Pierce* cases are not to be overruled or disregarded the judgment of the Circuit Court must be reversed.

In this case, Chae Chan Ping has been deprived of liberty, and the opportunity of access to, and the control of property, (if he had any), certainly of the right to labor in the city and state of his residence. He has been deprived of rights which Blackstone called—

"absolute rights of individuals, * * * which would belong to their persons merely in a state of nature and which every man is entitled to enjoy, whether out of society or in it,"—

of rights, the withdrawal of which, it was admitted by counsel for the State of Missouri in the Cummings case, would have punishment without due process of law. If Cummings were rightfully permitted to exercise his priestly, and Garland his legal vocation, without taking the oath of loyalty, *a fortiori* is Chae Chan Ping "entitled" to wash and dig and otherwise serve the good people of California who may see fit to employ him as a "laborer."

In the case *In re Yung Sing Hee*, 36 Fed. Rep., 437, Judge DEADY holds that the Exclusion act of October 1, 1888, is inapplicable to children born within the United States of Chinese parents for the reason that,—(we quote from the *syllabus*):

"A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, for any cause or no cause, or because of his race or color, is a bill of attainder within the prohibition of the Constitution, and therefore void."

Judge DEADY says, (page 439):

"A bill of attainder is a special act of the Legislature which inflicts punishment without a judicial trial. If the punishment is less than death, the act is called a

'bill of pains and penalties.' *Cummings vs. Missouri*, 4 Wall., 277. The phrase 'bill of attainder,' as used in the constitution, includes bills of pains and penalties. *Fletcher vs Peck*, 6 Cranch, 138.

"Banishment or exile is a recognized mode of punishment. Rap. & L., Law Dict. 'Banishment.' The bill against the Earl of Clarendon passed in the reign of Charles II., enacted that the earl should suffer perpetual exile and be forever banished from the realm. Hume's History of England. A legislative act which undertakes to inflict the punishment of banishment or exile from the United States on a citizen thereof, and thereby deprives him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder, within the clause of the Constitution of the United States, prohibiting the passage of such bills, and is therefore void."

In the case of *In re Look Tin Sing*, 21 Fed. Rep., at page 910, Mr. Justice FIELD, with whom concurred Justices SAWYER, SABIN and HOFFMAN, (as to the latter see note to page 905), held that:

"No citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws and beyond the power of Congress."

*In re Wy Shing*, 36 Fed. Rep., 553, the same rule was applied by Judge SAWYER to the case of a son of Chinese parents born in San Francisco, who had been taken to China at six years of age. remained until 13 years old, again went to China when 14 years of age, and there remained until September, 1888, both of his parents still remaining in China. The learned judge, after referring to the *Look Tin Sing case*, in which he had concurred, says, (at page 554):

"I am still satisfied with this ruling; but, if I were in doubt, I should not presume to overrule Mr. Justice FIELD upon a question which he has so maturely considered and decided. * * * The petitioners are citi-

zens, and are not, and they cannot be, excluded from the United States under the provisions of the late act in question."

If the banishment or exile of the child of Chinese laborers born in the United States be punishment, it is difficult to see why it is not punishment when inflicted on the parents. There may be a difference, in legal results, between the cases of citizens and alien residents, sought to be excluded from the country, although Mr. Jefferson and Mr. Madison were unable to see it, but this distinction, if well founded, must be sustained by other differences than in the character of the punishment. If the exclusion be punishment in one case, it must be in the other. Congress is as much forbidden to attaint or to punish by an *ex post facto* law an alien resident as a citizen—the alien parent as the native child. The Constitution does not say:

"Congress shall not pass a bill of attainder against *a citizen* or an *ex post facto* law punishing *a citizen*."

The prohibition is universal and applicable to everybody. It is to be construed as being *in pari materia* with the provision of the *fifth* amendment which ensures—

"due process of law,"

to alien residents as well as their native children; to foreigners as well as citizens. Congress in depriving any "*person*" of "life, liberty or property," must provide for the employment of "due process of law," and this "due process of law" can in no case consist of an attainder or *ex post facto* law, for the use of either of these legal devices for inflicting punishment has been forbidden.

Whatever be the inconvenience that may result from this doctrine, it must have been maturely considered and rejected as inconsiderable by the framers of the Constitution; at any rate, they have impressed by both the letter and spirit of the Constitution upon the laws and institutions of the country, two distinct negatives, one forbidding Congress from passing a bill of attainder or *ex post facto* law, the other forbidding Congress from interfering with or depriving any "person," (not any "citizen," but any "person,") of "life, liberty or property" without "due" process of law, that is to say, without some process of law other than an attainder or *ex post facto* law.

The judicial leaning against legislative punishments found expression at a very early date in our history. Before Massachusetts had become one of the United States except by assent to the Articles of Confederation, and while she possessed the full power of legislative attainder, it was provided by law, (April 30, 1779), that—

"Every inhabitant of this or any other of the late Colonies or then States, who since the 19th of April, 1775, had withdrawn without the permission of the legislative or executive authority of this or some other of the United States into parts or places under the acknowledged authority or domain of the King of Great Britain, and had not before the passing of the act returned into some one of the United States, and been received as a subject thereof and (if required) taken an oath of allegiance to such States, shall be taken, held, deemed and adjudged to have freely renounced all civil and political relations to each and every of the United States, and be considered as an alien."

The case of *Kilham vs. Ward*, 2 Mass., 236, arose under this act. It was argued by JOSEPH STORY and

SAMUEL PUTNAM. The result we quote from the *syllabus* as follows:

"A person who left this country after the commencement of the Revolutionary War, went to and resided in the British Territories for several years and returned to the United States before the treaty of peace, is a citizen and not an alien. The Absentee act of April 30, 1779, operates no disqualification upon a person who was not prosecuted and convicted under it."

Concurring opinions were pronounced by PARKER, SEWALL and SEDGWICK, JJ. The following is an extract from Judge PARKER'S opinion, (page 264):

"Such acts, in my opinion, cannot operate *ipso facto* against any persons except those who are expressly named in them, and whose particular cases may, therefore, be presumed to have undergone an examination by the Legislature. Persons who are not so named, who are in the situation of the plaintiff, have a right to claim a trial and hearing before the act shall affect them."

There is but one theory upon which the constitutionality of any part of the Exclusion act of October 1, 1888, can be sustained, and that is by treating it as operating wholly *in futuro*, forbidding the future issue of certificates only, rendering them if issued thereafter void, and withdrawing from Chinese laborers thereafter leaving the country any right or promise of the right to return. This, at least, would relieve the statute of its *ex post facto* character. The offense, to which the legislative punishment of exclusion would be applicable would then necessarily be committed after the passage of the act. The investigation provided for by the *twelfth* Section of the act might be treated as "due process of law" for the punishment of a Chinese laborer, found in the country, having left

it after October 1, 1888, and justice would then be judicially administered, and not follow as the mere result of the statute.

We are aware that this would be almost to eviscerate the statute, but it is impossible for us to see how it can be sustained as having any legal effect except on this theory.

In the history of nations as well as individuals, it must needs be that offenses come. The doctrine that the "king can do no wrong" may be a good working theory, but, in point of fact, is far from true. Nor is the "voice of the people" always "the voice of God." The doctrine that Courts require legislative invasions of the Constitution to be palpably visible before they stretch forth the right arm of judicial power for the preservation of fundamental rights, is another good working theory. It may also be that Courts sometimes observe the conflict between laws and the Constitution, and uphold the latter, with regret. Nevertheless, it is true that the working of Governments, being in the hands of fallible men, must be occasionally attended with error, and, (let us hope, rarely, with), wrong and injustice. Few American citizens remember with pleasure the history of the dealings of the Federal Government with the holders of the French spoliation claims, or of some of the States with their creditors. Yet, when it come to pass, that the judgment of the Court, pronouncing an act unconstitutional, is in accordance with the dictates of what was once scoffingly, but is now reverently, called "the higher law," in accordance with the dictates of

humanity in the past, as well as the teachings of the human heart in the present, of the sentiment of the Roman dramatist Terence, ("*Humani nihil a me alienum puto*"), as well as of the Apostle to the Gentiles, ("And hath made of one blood all nations of men for to dwell on all the face of the earth,") the emotion, with which the judgment of reversal in this case will be entered, must be of unalloyed satisfaction.

Respectfully submitted,

GEORGE HOADLY,

JAMES C. CARTER,

Of Counsel for Appellant.

New York, March 25th, 1889.

Office Supreme Court U. S.
FILED,
FEB 27 1889
JAMES H. McKENNEY,
CLERK.

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1888.**

**No. 1446.**

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**CHAE CHING PING, APPELLANT,**

*vs.*

**THE UNITED STATES, RESPONDENT.**

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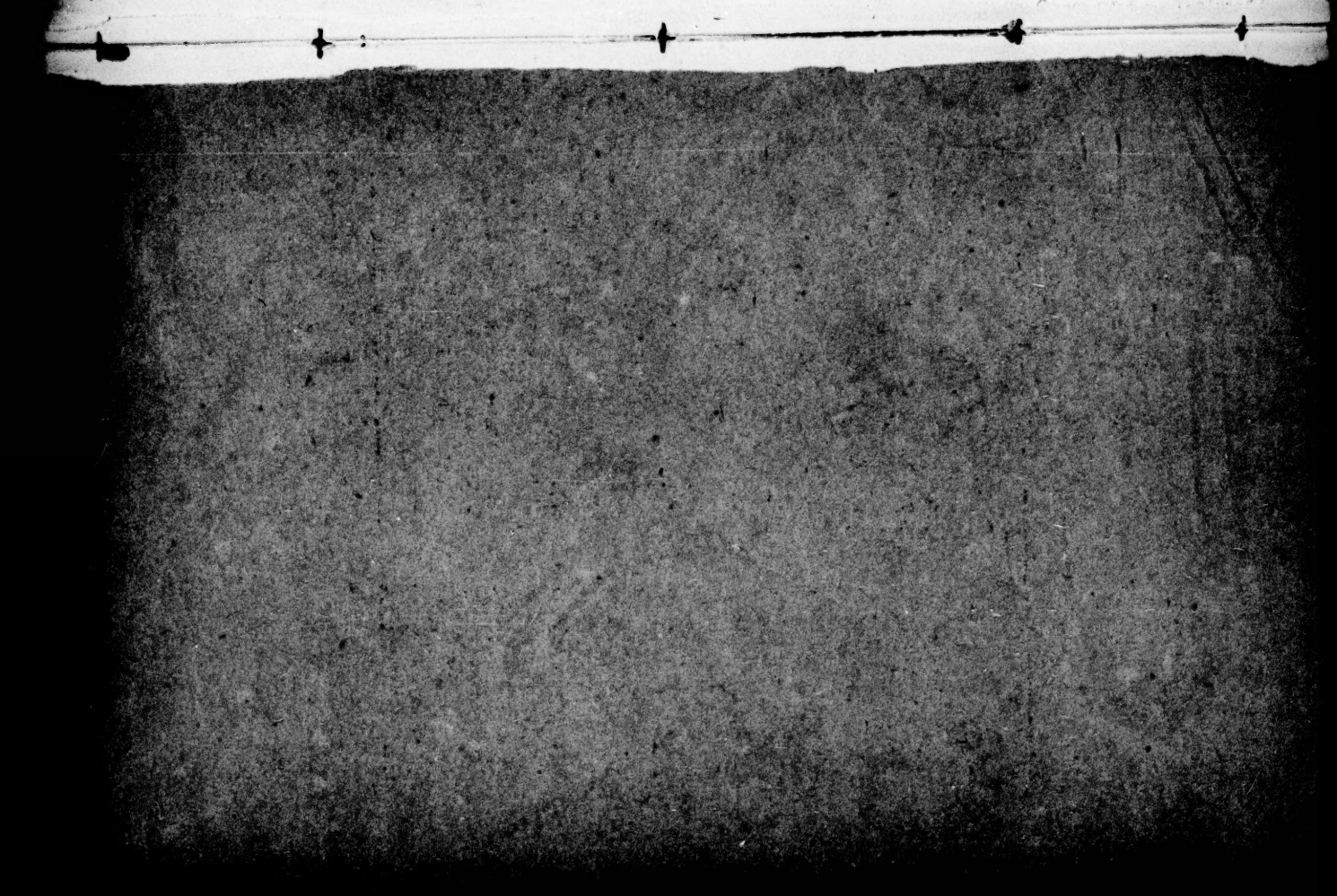
## ARGUMENT ON BEHALF OF APPELLANT

BY

**HARVEY S. BROWN and**
**THOS. D. RIORDAN,**
**Of Counsel.**



# SUPREME COURT

OF THE

## UNITED STATES.

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CHAE CHAN PING,
*Appellant,*

vs.

THE UNITED STATES,
*Respondent.*

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### STATEMENT OF CASE.

The appellant is a Chinese laborer who came to the United States under the Burlingame Treaty and remained here until the 2d of June, 1887, when he returned to China. Before doing so, and on the date named, at the port of San Francisco he demanded and received from the Collector of Customs a laborer's certificate under the Restriction Act of May 6, 1882, as amended by the act of July 5, 1884. By the terms of this certificate he was entitled "*to "return and re-enter the United States upon producing and "delivering this certificate to the Collector of Customs of the "district at which he shall seek to re-enter.*"

On the 7th of September, 1888, appellant took passage and sailed from Hongkong for San Francisco. He arrived at San Francisco on the 7th day of October, 1888. He presented said certificate to the customs officers and demanded permission to land in conformity with its conditions, but the "Collector refused to per-"mit him to land, solely on the ground that under the Exclusion "Act of October 1, 1888, the certificate was annulled and made "void and his right to land abrogated, and that the petitioner was "thereby forbidden to again enter the United States." He thereupon sued out a writ of *habeas corpus* before the Circuit Court of

the United States and, upon a hearing, was by the judgement of that Court *remanded to the custody of the master of the steamhip, where he was taken.* From this judgement he appealed to this Honorable Court.

## TEXT OF EXCLUSION ACT OF OCTOBER 1, 1888.

Section 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this Act it shall be unfawful for any Chinese laborer who shall at any time heretofore have been or may now or hereafter be a resident within the United States, and who shall have departed or shall depart therefrom, and shall not have returned before the passage of this Act, to return to or remain in the United States.

Sec. 2. That no certificates of identity provided for in the fourth or fifth sections of the Act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect; and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

Sec 3. That all the duties prescribed, liabilities, penalties and forfeitures imposed and the powers conferred by the second, tenth eleventh and twelfth sections of the Act to which this is a supplement are hereby extended and made applicable to the provisions of this Act.

Sec. 4. That all such part or parts of the Act to which this is a supplement as are inconsistent herewith are hereby repealed.

## ARGUMENT.

It is conceded that Congress has the power to abrogate a treaty between the United States and a foreign power, and that the Exclusion Act of October 1, 1888, was intended to abrogate and does abrogate prior treaties with China, so far as Chinese laborers are concerned, and that all Chinese laborers who have not visited the United States under these treaties are now lawfully debarred from coming to this country; but as to those who have been here and departed with certificates, we submit the following proposition :

**Where a subject of a foreign power has under the express terms of a treaty or law acquired valuable or vested rights, whether they relate to property or individual liberty, he cannot by legislation alone be deprived of those rights.**

The first question that naturally arises is, What rights did the Chinese laborer acquire? By the provisions of the Burlingame Treaty, "Chinese subjects visiting or residing in the United States

"shall enjoy the same privileges, immunities and exemptions in "respect to travel or residence as may there be enjoyed by the "citizens or subjects of the most favored nations." 16th S. of U. S., page 740.

By the terms of the treaty of 1880 it was solemnly agreed that "Chinese who are now (were then) in the United States shall be "allowed to go and come of their own free will and accord, and "shall be accorded all the rights, privileges, immunities and "exemptions which are accorded to the citizens of the most "favored nations."

The Chinese laborer who availed himself of the former treaty and came to this country was endowed so far as travel and the acquisition of property are concerned, with the same rights, privileges, immunities and exemptions as were citizens of the United States; and these rights were still further guaranteed to him by the treaty of 1880.

But further than this, by the provisions of section 4 of the Restriction Act of 1882 as amended by the act of 1884 for the purpose of identifying Chinese laborers "*And in order to furnish "them with proper evidence of their right to* go from and come to "the United States," &c., it was made the duty of the collector of customs of the district from which any such Chinese laborer shall depart from the United States, either in person or by deputy, to go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and make a list of all such Chinese laborers, which shall be entered in registry books kept for that purpose, in which shall be stated the individual, family and tribal name in full, the age, occupation, when and where followed, last place of residence, physical marks or peculiarities and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the Custom House; and *every such Chinese laborer so departing from the United States shall be entitled to and shall receive, free of any charge or cost, upon application therefor from the collector or his deputy in the name of said collector and attested by the said collector's seal of office* at the time such list is taken, *a certificate signed by the collector or his deputy and attested by his seal of office* in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement, &c., corresponding with the list and registry in all particulars. * * * "The *certificate herein provided for "shall entitle the Chinese laborer to whom the same is issued to "return to and re-enter the United States upon producing and "delivering the same to the collector of customs* of the district at "which such Chinese laborer shall seek to re-enter, *and said "certificate shall be the only evidence permissible to establish his "right of re-entry.*" 112 U. S. Repts., page 544.

**The Exclusion Act of October 1st, 1888, is Void because it Impairs the Obligation not only of one but of two Distinct Contracts.**

The treaties referred to were originally contracts between the respective powers, but when the Chinese laborer availed himself of their provisions and became a resident of the United States these contracts inured to his benefit. He became a party to them, and neither the action of the Government of the United States, nor that of the Emperor of China, nor the joint action of both Governments could constitutionally impair the obligation of that contract. The United States might by legislation attempt to deprive him of the rights, privileges, immunities and exemptions which he had secured, but his *individual interest* in the contract would protect him. The Emperor of China might command him to surrender them and that same interest in the contract would protect him. Both Governments might join in the attempt to deprive him of those rights, privileges, immunities and exemptions, and the contract would be his shield. *He can no more be deprived of them by legislation than could an American citizen.*

The certificate issued by the Collector of Customs is to all intents and purposes a contract. He demanded it from the collector and the latter was compelled to issue it to him. It is issued by the deputy collector officially and attested by the collector's seal of office. *In express terms appellant was therein solemnly promised that he was entitled to return and to re-enter the United States* upon producing and delivering the certificate to the Collector of Customs. The obligations of this contract are attempted to be impaired and utterly destroyed by the legislation in question.

While the Constitution does not in terms prohibit the United States from impairing the obligation of contracts, yet "the United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies as it would be if the repudiator had been a state, or a municipality, or a citizen." Opinion of Court in Sinking Fund cases, 99th U. S. Rept., p. 719.

Mr. Justice Strong, in his dissenting opinion at page 737, said: "No power has been given to Congress to *lessen* the obligtiaons "of a contract between private parties by direct legislation, except "by the enactment of uniform laws on the subject of bankruptcy. "Even a bankrupt law cannot be enacted applicable only to single "corporations or single debtors. To be constitutional, it must be "uniform throughout the United States. I admit that in the exer- "cise of some of the powers granted, Congress may enact laws that "indirectly affect existing contracts and lessen their obligation, but "I deny that it can by any direct action, otherwise than by a bank- "rupt law, even relieve a debtor to a private party from any duty "he has assumed by his contract. Much less can it change the

"stipulations of the contract and impose additional liabilities upon "a contractor with the government. Such an exercise of power "would be making a contract for parties to which they never "assented. In all the history of congressional legislation before "the Act of 1878, such power was never attempted to be exercised."

Mr. Justice Bradley, in his dissenting opinion at page 745, said: "But it is said that Congress is not subject to any inhibition "against passing laws impairing the validity of contracts. This "is true; and the reason why the inhibition to that effect was "imposed upon the States and not upon Congress evidently was "that the power to pass bankrupt laws should be exclusively "vested in Congress, in order that the bankrupt system might be "uniform throughout the United States. When the States exer- "cised the power, they often did it in such a manner as to favor "their own citizens at the expense of the citizens of other States "and of foreign countries. It was deemed expedient, therefore, "to take the power from the States so far as it might involve the "impairing the validity of contracts. State bankrupt laws, since "the Constitution went into effect, have only been sustained "when operating prospectively upon contracts; and then only in "the absence of a national law. The inhibition referred to "undoubtedly had its origin in these considerations. It fully "explains the fact that no such inhibition was laid upon the "national legislature; and the absence of such an inhibition, "therefore, furnished no ground of argument in favor of the "proposition that Congress may pass arbitrary and despotic laws "with regard to contracts any more than with regard to any other "subject matter of legislation."

Mr. Justice Field, in his dissenting opinion, also discussed this question, and after repeating the views of various Courts, said at page 764:

"Independent of these views there are many considerations "which lead to the conclusion that the power to impair contracts, "by direct action to that end, does not exist with the general gov- "ernment. In the first place, one of the objects of the Constitu- "tion, expressed in its preamble, was the establishment of justice, "and what that meant in its relations to contracts is not left, as "was justly said by the late Chief Justice in *Hepburn* vs. *Griswold*, "to influence or conjecture;" and again at page 765, "In *Calder* "vs. *Bull*, which was here in 1798, Mr. Justice Chase said, that "there were acts which the Federal and State legislatures could "not do without exceeding their authority, and among them he "mentioned *a law which punished a citizen for an innocent act*; a "law that destroyed or impaired the lawful private contracts of "citizens; a law that made a man judge in his own case; and a "law that took the property from A and gave it to B. 'It is "'against all reason and justice,' he added, 'for a people to intrust "'a legislature with such powers, and therefore it cannot be pre-

" 'sumed that they have done it. They may command what is " 'right and prohibit what is wrong; but *they cannot change inno-* " '*cence into guilt*, or *punish innocence* as a crime, or violate the " 'right of an antecedent lawful private contract, or the right " 'of private property. To maintain that a Federal or State " 'legislature possesses such powers, if they had not been expressly " 'restrained, would, in my opinion, be a political heresy altogether " 'inadmissable in all free republican governments.' " 3 Dall. 388.

In *Ogden* vs. *Saunders*, which was before this Court in 1827, Mr. Justice Thompson, referring to the clauses of the Constitution prohibiting the State from passing a bill of attainder, an *ex post facto* law, or a law impairing the obligation of contracts, said: "Neither provision can strictly be considered as introducing any " new principle, but only for greater security and safety to incor- " porate into this charter provisions admitted by all to be among " the first principles of our government. No State Court would, " I presume, sanction and enforce an *ex post facto* law, if no such " prohibition was contained in the Constitution of the United " States; so, neither would retrospective laws, taking away vested " rights, be enforced. Such laws are repugnant to those funda- " mental principles upon which every just system of law is " founded."

"In the Federalist, Mr. Madison declared that laws impairing " the obligation of contracts were contrary to the first principles " of the social compact and to every principle of sound legisla- " tion; and in the Dartmouth College case Mr. Webster contended " that act, which were then held to impair the obligation of con- " tracts, were not the exercise of a power properly legislative, as " their object and effect was to take away vested rights. 'To " 'justify the taking away of vested rights,' he said, 'there must " 'be a forfeiture, to adjudge upon and declare which is the proper " 'province of the judiciary.' Surely the Constitution would have " failed to establish justice, had it allowed the exercise of such a " dangerous power to the Congress of the United States."

"In the second place, legislation impairing the obligation of " contracts impinges upon the provision of the Constitution which " declares that no one shall be deprived of his property without " due process of law; and that means by law in its regular course " of administration through the courts of justice. Contracts are " property, and a large portion of the wealth of the country exists " in that form. Whatever impairs their value diminishes, there- " fore, the property of the owner; and if that be effected by direct " legislative action operating upon the contract, forbidding its en- " forcement or transfer, or otherwise restricting its use, the owner " is as much deprived of his property without due process of law " as if the contract were impounded, or the value it represents " were in terms wholly or partially confiscated." Cooley, in his work on Constitutional Limitations, 4th Ed., page 314, also lays down the same doctrine.

II.

**The Act of October 1st, 1888, is in contravention of the Fifth Amendment to the Constitution of the United States in this, that it deprives the Appellant of both Liberty and Property without due Process of Law.**

## LABOR IS PROPERTY.

The Legislature of California, under the Constitution of 1879, passed an amendment to the Penal Code, by which it was made a misdemeanor for any officer of a corporation to employ Chinese or Mongolian labor. Parrot being an officer of a corporation was arrested, tried, convicted and imprisoned for a violation of said act. He was brought by *habeas corpus* before the Circuit Court for the District of California, see 6th Sawyer's reports, p. 349. Sawyer, C. J., after citing the provisions of the treaty at page 372, said "The words 'privileges and immunities' as used in the "Constitution in relation to the rights of citizens of the different "states have been fully considered by the Supreme Court of the "United States and generally defined, and there can be no doubt "that the definitions given are equally applicable to the same "words as used in the treaty with China."

"No enumeration would, I think, be attempted of the privi-"leges, immunities and exemptions of the most favored nation, or "even of man in civilized society which would exclude the right "to labor for a living. It is as inviolable as the right of property, "for property is the offspring of labor. It is as sacred as the right "to life, for life is taken if the means whereby we live be taken." "The right of persons of those of other nationalities to support "themselves by their labor stands on no other or higher ground "than of the Chinese. The latter have even the additional "advantage afforded by the express and solemn pledge of the "nation." In the Slaughter-house cases, the Supreme Court approvingly cites and reaffirms from the opinion of Mr. Justice Washington in *Corfield* vs. *Coryell*, the following passage: "The "inquiry is, what are the privileges and immunities of citizens of "the several states? We feel no hesitation in confining these "expressions to those privileges and immunities which are "fundamental, which belong to the rights of citizens of all free "governments and which have at all times been enjoyed by "citizens of the several states which compose this Union from the "time of their becoming free, independent and sovereign. What "these fundamental principles are it would be more tedious than "difficult to enumerate. They may all, however, be compre-"hended under the following general heads: *Protection by the "government, with the right to acquire and possess property of every "kind, and to pursue and obtain happiness and safety*, subject,

" nevertheless, to such restraints as the government may prescribe " for the general good of the whole." The court then adds: " *The description*, when taken to include others not named, but " which are of the same general character, *embraces nearly every " civil right for the establishment and protection of which organized " government is established.*" (16 Wall., 76.)

"And in *Ward* vs. *Maryland*, the same Court observes: " Beyond doubt these words (privileges and immunities) are " words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and " protects the right of a citizen of one State to pass into any other " State of the Union for the purpose of engaging in lawful " commerce trade or business without molestation; to acquire " personal property; to take and hold real estate," etc. (12 Wall., 430).

" So in the Slaughter-house cases. Mr. Justice Field remarks " upon these terms: "The privileges and immunities designated " are those which of right belong to citizens of all free governments. " Clearly among these must be placed the right to pursue a lawful employment in a lawful manner without other restraint than " such as equally affects all persons." (16 Wall., 97.)

"Mr. Justice Bradley, in discussing the question as to what is " embraced in the 'privileges and immunities' secured to the " citizens, among other equally pointed and emphatic declarations, " says: " In my judgment the right of any citizen to follow whatever lawful employment he chooses to adopt(submitting himself to " all lawful regulations) is one of the most valuable rights, and one " which the legislature of a State cannot invade, whether restrained " by its own Constitution or not."(16 Wall.,113, 114.) He also enumerates as among the fundamental rights embraced in the privileges " and immunities of a citizen all the absolute rights of individuals " classed by Blackstone under the three heads: "The right of " personal securitv; the right of personal liberty; and the right of " private property," (*Id.* 115.) And in relation to these rights " says: "In my view, *a law which prohibits a large class of citi- " zens from adopting a lawful employment, or from following a law- " ful employment previously adopted, does deprive them of liberty " as well as property, without due process of law. Their right of " choice is a portion of their liberty; their occupation is their " property.* Such a law also deprives those citizens of the equal " protection of the laws contrary to the last clause of the section," " (*Id.* 122.) And Mr. Justice Swayne supports his view in the " following eloquent and emphatic language: "Life is the gift " of God, and the right to preserve it is the most sacred of the " rights of man. *Liberty is freedom from all restraints but such " as are justly imposed by law. Beyond that line lies the domain of " usurpation and tyranny.* Property is everything which has an " exchangeable value, and *the right of property includes the power*

" *to dispose of it according to the will of the owner. Labor is prop-*
" *erty, and as such merits protection. The right to make it avail-*
" *able is next in importance to the rights of life and liberty. It lies,*
" *to a large extent, at the foundation of most other forms of property.*"
(*Id.* 127.)

" Some of these extracts are from the dissenting opinions, but
" not upon points where there is any disagreement. There is no
" difference of opinion as to the signification of the terms 'privi-
" leges and immunities.' Indeed, it seems quite impossible that
" any definition of these terms could be adopted, or even seriously
" proposed, so narrow as to exclude the right to labor for subsist-
" ence. As to by far the greater portion of the Chinese, as well
" as other foreigners who land upon our shores, their labor is the
" only exchangeable commodity they possess. To deprive them
" of the right to labor, is to consign them to starvation. The
" right to labor is, of all others, after the right to live, the
" fundamental, inalienable right of man, wherever he may be
" permitted to be, of which he cannot be deprived, either under
" the guise of law or otherwise, except by usurpation and force.
" Man ate and died. When God drove him forth from the Garden of
" Eden to till the ground, from whence he was taken, and said
" to him, 'in the sweat of thy face shalt thou eat bread till thou
" returns unto the ground,' he invested him with an inalienable
" right to labor in order that he might again eat and live. And
" this absolute, fundamental, natural right was guaranteed by the
" national government to all Chinese who were permitted to come
" into the United States under the treaties with their government,
" 'for the purpose of curiosity, of trade, or as permanent residents,'
" to the same extent as it is enjoyed by citizens of the most favored
" nation. It is one of the 'privileges and immunities' which
" it was stipulated that they should enjoy in that clause of the
" treaty which says: 'Chinese subjects, visiting or residing in
" 'the United States, shall enjoy the same privileges, immunities
" 'and exemptions in respect to travel or residence as may there be
" 'enjoyed by the citizens or subjects of the most favored nation.'"
6 Wall, 36.

By the treaty appellant had acquired the right to live in the United States to labor, to acquire property and to protect it in the same manner as any citizen could.

But he had also acquired by the same instrument the same "privileges and immunities" as to liberty as were enjoyed by the native citizen.

Are any so rash as to claim that a citizen can *by legislation* be deprived of the right to return to his country after he has temporarily departed therefrom? That legislation can deprive him of the right to return and visit his friends, collects his debts and take care of and dispose of his property in person?

In *Wilkinson* vs. *Leland*, 2d Peters' Repts., Mr. Justice Story, in the opinion of the Court at page 657 said, "That government "can scarcely be deemed to be free where the rights of property "are left solely dependent upon the will of a legislative body, "without any restraint. The fundamental maxims of a free "government seem to require that the rights of personal liberty "and private property should be held sacred. At least no court "of justice in this country would be warranted in assuming, that "the power to violate and disregard them—a power so repugnant "to the common principles of justice and civil liberty—lurked "under any general grant of legislative authority, or ought to be "implied from any general expressions of the will of the people. "The people ought not to be presumed to part with the rights so "vital to their security and well-being, without very strong and "direct expressions of such an intention. In *Terret* vs. *Taylor*, "9 Cranch, 43, it was held by this court, that a grant or title to "lands once made by the legislature to any person or corporation "is irrevocable, and cannot be reassumed by any subsequent legis-"lative act; and that a different doctrine is utterly inconsistent "with the great and fundamental principle of a republican govern-"ment, and with the right of the citizens to the free enjoyment "of their property lawfully acquired. We know of no case, in "which a legislative act to transfer the property of A to B without "his consent, has ever been held a constitutional exercise of legis-"lative power in any state in the Union. On the contrary, it has "been constantly resisted as inconsistent with just principles by "every judical tribunal in which it has been attempted to be "enforced."

This is the first time in the history of this government since the passage of the Alien and Sedition Acts that an attempt has been made to deprive foreigners of the immunities and privileges enjoyed under treaty stipulations.

June 25, 1798, Congress passed "an Act concerning Aliens," 1st Statute at Large, page 570. This act related to *all* aliens. It authorized the President "at any time during the con-"tinuance of the Act (which was two years) to *order* all "such *aliens* as he shall judge dangerous to the peace and "safety of the United States, or shall have reasonable grounds "to suspect are concerned in any treasonable or secret machi-"nations against the government thereof, to depart out of the "territory of the United States, within such time as shall be "expressed in such order, which order shall be served on such "alien by delivering him a copy thereof or leaving the same at "his usual abode and returned to the office of the Secretary of "State by the marshal or other person to whom the same shall be "directed." In case the party served was found at large after the time limited he was liable to prosecution, and on conviction to be imprisoned for a term not exceeding three years.

On the 6th day of July, 1798, Congress passed another act entitled "An Act Restricting Alien Enemies," 1st Statutes at Large, 577. This Act had reference to a state of war or threatened invasion. All Courts of the United States and of each State having criminal jurisdiction, and the several Judges and Justices of the Courts of the United States were authorized to hear complaints against any alien enemies—cause them to be apprehended, and after a full examination, etc., and sufficient appearing to order such alien enemy to be removed out of the United States.

The passage of the last-named act was acquiesced in by the people, but the first mentioned act met with great opposition.

The General Assembly of Virginia passed resolutions concerning the alien and sedition law and other matters, and other States passed resolutions upon the same subject, some approving and others disapproving. The House of Delegates referred all those communications to a committee, who made a report relative to the resolutions, which will be found in the 4th vol. of Writings of James Madison, p. 515. At page 524 will be found the resolution as to the Alien and Sedition Law.

## EXTRACTS FROM REPORT.

"With respect to aliens who are not enemies, but members of "nations in peace and amity with the United States, the power "assumed by the Act of Congress is denied to be constitutional, and "it is accordingly against this Act that the protest of the General "Assembly is expressly and exclusively directed. A third ob- "servation is that were it admitted, as is contended, that the 'Act "Concerning Aliens' has for its object, not a *penal*, but a *pre-* "*ventive* justice, it would still remain to be proved that it comes "within the constitutional power of the Federal Legislature; and, "if within its power, that the Legislature has exercised in a con- "stitutional manner.

"In the administration of preventive justice the following prin- "ciples have been held sacred: That some probable ground of "suspicion be exhibited before some judicial authority; that it be "supported by oath or affirmation; that the party may avoid "being thrown into confinement by finding pledges or sureties for "his legal conduct, sufficient in the judgment of some judicial "authority; that he may have the benefit of a writ of *habeas* "*corpus*, and thus obtain his release if wrongfully confined; and "that he may at any time be discharged from his recognizance, or "his confinement, and restored to his former liberty and rights on "the order of the proper judicial authority, if it shall see suffi- "cient cause.

"All these principles of the only preventive justice known to "American jurisprudence are violated by the Alien Act."

"But, in the last place, it can never be admitted that the removal of aliens, authorized by the Act, is to be considered, not as punishment for an offence, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness—a country where he may have formed the most tender connections; where he may have invested his entire property and acquired property, of the real and permanent as well as the the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty, than he can elsewhere hope for, and where he may have nearly completed his probationary title to citizenship; if, moreover, in the execution of the sentence against him he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes which his emigration itself may have provoked; if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. And if it be a punishment, it will remain to be inquired whether it can be constitutionally inflicted, on mere suspicion, by the single will of the Executive Magistrate, on persons convicted of no personal offence against the laws of the land, nor involved in any offence against the law of nations charged on the foreign state of which they are members.

"One argument offered in justification of this power exercised over aliens is, that the admission of them into the country being of favor, not of right, the favor is at all times revocable."

"To this argument it might be answered, that, allowing the truth of the inference, it would be no proof of what is required."

"*But it cannot be a true inference, that, because the admission of an alien is a favor, the favor may be revoked at pleasure. A grant of land to an individual may be of favor, not of right; but the moment the grant is made, the favor becomes a right, and must be forfeited before it can be taken away. To pardon a malefactor may be a favor, but the pardon is not, on that account, the less irrevocable. To admit an alien to naturalization is as much a favor as to admit him to reside in the country; yet it cannot be pretended that a person naturalized can be deprived of the benefits any more than a native citizen can be disfranchised.*"

The Exclusion Act is inflexible—inexorable. Neither necessity nor humanity can abate its rigor. The laborer is its victim. He is a prisoner on shipboard. He cannot return to the land he so recently left with a printed and written promise from the government, attested by the seal of office of one of its most important local officers, that he might return and re-enter the country—the only condition being that he must produce and deliver that certificate to the collector of customs. He has com-

mitted no offence—has contracted no debt. He has no loathsome or contagious disease. He is not a criminal nor a pauper. He has money on his person and on deposit in San Francisco. He presents his certificate to the proper officer and demands that he be permitted to land. He is told that he cannot do so, that the government of the United States has repudiated its promise and declared that its own certificate is worthless and void, not because of any inherent defect either in form or substance, but solely because he is a Chinaman.

He is told not only that he cannot land, but that he must remain a prisoner on shipboard until the steamer returns. Vainly might he urge that he at least desired to land in order that he might collect debts which were due him—that he was under bonds to appear as a witness in a criminal action to be tried in a distant portion of the state—that he had entered into a contract to perform a certain work which was to be commenced within a few days thereafter, and that unless he did so he would lose a thousand dollars cash which he had put up as a guarantee that he would commence the work at a specified time and complete the same in a given period—that he had embraced the Christian religion and he desired to attend divine service on the Sabbath—that his most intimate friend and benefactor was dead and about to be buried, and he desired as a mark of respect and gratitude to be present at his funeral—that he desired at least to see his wife and children—that his wife needed his protection—that his children were sick unto death and if he did not now see them he never could do so. Thus, by a law passed by a philanthropic and Christian nation in the year of our Lord 1888, the poor laborer is prevented from giving personal attention to his property; from collecting or paying his debts; from protecting his innocent bondsmen; from performing his contracts; from receiving Christian instruction and consolation; from protecting the wife of his bosom; from visiting his dying children and from burying his dead; despoiled of his property; deprived of his liberty; confined—a prisoner without due process or any pretended process of law, without judge, jury, warrant, commitment, conviction or trial. Well may we exclaim "*O tempora, O Mores.*"

"Time is money" is an old and valuable aphorism. The laborer loses his time while imprisoned on ship-board and during his return voyage fo China, and so long as he remains there, if able there to obtain employment, his earnings for a year do not exceed those of a single month in California. But he is also deprived of additional property—he must pay his return passage to China.

III.

**The Act in question is in contravention of Sub. 5 of Sec. 9 of Article 1 of the Constitution of the United States, which provides that "No Bill of Attainder or ex post facto law shall be passed."**

"A bill of attainder is a legislative act which inflicts punish-"ment without a judicial trial." *Cumming* vs. *Missouri*. 4th Wallace, 323.

"The deprivation of any right, civil or political, previously en-"joyed, may be punishment, the circumstances attending and the "causes of the deprivation determining this fact. Disqualification "from office may be punishment, as in cases of conviction upon "impeachment. *Disqualification from the pursuits of a lawful* "*avocation*, or from positions of trust, or from the privileges of "appearing in the courts, or acting as executor, or administrator, "or guardian may also and often has been imposed as punish-"ment." *Id.* 320.

"The theory on which our political institutions rest is, *that all* "*men have certain inalienable rights*, that among these are life, "liberty and the pursuit of happiness; and, in the pursuit of hap-"piness, *all avocations*, *all* honors, *all* positions are alike open to "everyone, and that in the protection of these rights all are equal "before the law. Any deprivation or suspension of any of these "rights for past conduct is punishment, and can be in no other-"wise defined." *Id.* 321.

"The constitution deals with substance, not shadows. *Its* "*inhibition was leveled at the thing, not the name.* It intended that "the rights of the citizen should be secure against deprivation for "past conduct by legislative enactment under any form, how-"ever disguised. IF THE INHIBITION CAN BE EVADED BY THE "FORM OF THE ENACTMENT, its insertion in the fundamental law "was a vain and futile proceeding." *Id.* 325.

"By an *ex post facto* law is meant, one which imposes a punish-"ment for an act which was not punishable at the time it was "committed; or imposes additional punishment to that then "prescribed; or changes the rules of evidence by which less or "different testimony is sufficient to convict, than was then "required." *Id.* 325.

"*It was no offence against any law to enter or leave the State of* "*Missouri* for the purpose of avoiding enrollment or draft in the "military service of the United States, however much the evasion "of such service might be the subject of moral censure. Clauses "which prescribe a penalty for an act of this nature are within "terms of the definition of an *ex post facto* law; they impose a "punishment for an act not punishable at the time it was com-"mitted."

And "exclusion from any of the professions or any of the ordi-
" nary avocations of life for past conduct," etc.

"All enactments of this kind partake of the nature of bills of
" pains and penalties, and are subject to the constitutional inhibi-
" tion against the passage of bills of attainder, under which gen-
" eral designation they are included."

Ex parte Garland, 4th Wall., 377.

Cooley, Cons. Lim., pp. 317–319, 4th Ed.

On the subject of ex post facto laws and bills of attainder, also see

Potter's Dwarris on Statutes, p. 167.

*Pierce* vs. *Carskadon*, 16 Wall, 234.

*Kring* vs. *Missouri*, 107 U. S., 227.

If an act involving moral turpitude or "moral censure" cannot under the Constitution be reached by an *ex post facto* law, how much the less can Congress make a perfectly innocent act of a person punishable by preventing him from entering the State, by imprisoning him on shipboard and by superior force sending him back to China?

In this case there is no ideal punishment, but a real and cruel one. And what is appellant's offence? Simply none. Only he departed from the State, as he had a right to do, and because he did so and for no other reason, and because he is a Chinaman, he is deprived of his natural rights, his statutory rights, and all the privileges and immunities that he had acquired under the treaty, and the only evidence of those rights is blotted out and rendered null and void by legislative enactment.

As well might Congress pass an act declaring that all patents issued by the government were null and void, and persons claiming title thereunder shall not maintain any action for the possession of the property described therein. Indeed, such a law would not be so liable to criticism as the one now under consideration.

Had Congress passed an act to confiscate the visible property of Chinese in the United States there would be none to defend it.

But as we have seen, "*labor is property*," and is as much entitled to constitutional protection as houses and lands. The time was when liberty occupied a higher position in the minds of men than mere property. Is it any the less dear now? Is it less appreciated now? Can a person now be deprived of this (save life) the highest of human rights and blessings by simple legislation? Let such legislation be attempted against European emigrants or against native-born American citizens, and there would be aroused such a hurricane of indignation as would sweep its authors into perpetual retirement.

We have carefully considered the various cases cited in the opinion of the court below, and we are unable to see that any one of them conflict in the slightest degree with the principles which we have attempted to vindicate; for early in the argument we admitted, and we now repeat, that where an Act of Congress passed subsequent to the ratification of a treaty conflicts with it the law will abrogate the treaty; but when a treaty contains provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other which partake of the nature of municipal law they are capable of enforcement as between private parties in the courts of the country. "An "illustration of this character is found in treaties which regulate "the mutual rights of citizens and subjects of the contracting "nations in regard to rights of property by descent or inheritance "where the individuals concerned are aliens." Head-money Cases, 112th U. S. R., p. 598.

"It will be admitted that *a right once vested does not require for "its preservation the continued existence of the power by which it "was acquired. If a treaty or any other law has performed its office "by giving a right, the expiration of the treaty or law cannot "extinguish that right.*"

"*But the Court is of opinion that the treaty had its full effect "the instant the right was acquired under it; that it had nothing "further to perform, and that its expiration or continuance after-"wards was unimportant.*"

*Chirack* vs. *Chirack*, 2 Wheaton, 277, 278.

*Carneal* vs. *Banks*, 10 Wheaton, 189.

*Society* vs. *New Haven*, 8 Wheaton, 494.

I will not venture to suggest or question the motives of those who are responsible for this legislation, but among all just and right-thinking people there cannot be but one opinion as to its wisdom. Fortunate it is that there is one department of the Government, who, without prejudice or political excitement, can be relied upon to correct unjust and unconstitutional legislation, and give unto all, the rich and the poor, the high and the lowly, equal and exact justice.

If to destroy solemn contracts—if a party can be deprived of both liberty and property without court or jury and without process of law—if innocent and lawful acts can, after their commission, be punished by a forfeiture of vested rights, and the only evidence of these rights can be destroyed by legislation alone, then is the act in question valid; if, on the contrary, these things cannot thus be done, then is it void and of no effect.

All of which is respectfully submitted.

HARVEY S. BROWN and
THOS. D. RIORDAN,
Of Counsel for Appellant.

IN THE

# *Supreme Court of the United States.*

No. 1446.

OCTOBER TERM, 1888.

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CHAE CHAN PING, *Appellant*,

*vs.*

THE UNITED STATES, *Appellees*.

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ARGUMENT OF

JOHN F. SWIFT AND STEPHEN M. WHITE,
*Of Counsel for Respondent.*

Concurred in by

G. A. JOHNSON, *Attorney Gen., Cal.*

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This case arises upon the claim of the appellant to enter the territory of the United States and reside there, in defiance of the distinct terms of an act of Congress prohibting his doing so. The claim is based upon rights supposed to accrue to him under the treaty of 1868, between China and this country, and the acts of Congress of 1882 and 1884, all prior to the act of 1888, which forbids his coming.

The entire line of treaties providing for, and the acts of Congress regulating Chinese immigration are exceptional in American legislation, and, so far as we

know, without precedent in the laws and treaties governing the intercourse between civilized States.

The transit in time of peace of well-disposed persons from one country to another for the purposes of trade or curiosity was always permitted by the common and established usages of Christian communities. That they must be kindly treated and protected in their persons and property, while abiding in the country as temporary visitors, or when they were moving about as travellers, or residing and pursuing their occupations as denizens, was never questioned. No treaty between sovereigns was considered necessary to secure these privileges, and when, in case of war, famine or other great exigency, the public good seemed to require their absence, such strangers were given timely notice to retire from the country, and no breach of public faith or even of the laws of hospitality was thought to have been committed. But China and other Oriental nations have pursued a different policy, namely, that of practically inhibiting trade and intercourse with outside peoples.

In order to induce China to change her customs in this respect, the Burlingame treaty was made. It cannot be justly said that it was done in order to increase or even to secure the coming hither of Chinese, for that they could always do so long as we allowed it, under our constitutions and laws then in force, and under the general customs and usages of civilized nations, existing as part of our laws.

The privileges thus extended by the Burlingame treaty to China can only be regarded as in the nature of a price paid that nation to abandon, in part, their ancient custom of non-intercourse and

throw open their doors to our merchants and their commodities. That treaty, like all others between sovereign States, was subject to be terminated by the act of either party.

The agreement was found by experience to work to our disadvantage, because of the too free immigration of a certain class of Chinese, and Congress resolved, for reasons satisfactory to itself, to rescind it, so far as it allowed the free coming hither of the unsatisfactory class, to wit, *Chinese laborers.*

There is but one question before the Court, which is, as to the power of Congress to rescind the treaty.

If the United States is a sovereign and independent State it cannot be deprived of its sovereignty by anything short of superior force coming from without.

It certainly cannot be deprived of it in piecemeal by Congress or the Executive through the treaty making power.

The power to determine what individuals of the human race, not citizens of the United States, may or may not peacefully come into the country from abroad, in the ordinary course of commercial or social intercourse, how they shall be treated while here, how long they may remain, and when and under what circumstances they shall be required to depart, are essential attributes and prerogatives of sovereignty, and a State can only lose them by being subjugated by another, in fact, by ceasing to be a State, in which case they are transferred to the conqueror who thereafter exercises them, and is the State.

The resolve of the United States to terminate the privilege of Chinese laborers to come at will to this

country, resulted in the treaty of Nov. 17, 1880, and the acts of Congress of 1882 and of 1884, which, by their terms, excluded the great mass of Chinese laborers, and finally the act of Oct. 1, 1888, which reached and in plain terms covered the case of *Chae Chan Ping*, the appellant.

That the act of Oct. 1, 1888, distinctly, and in every part fits the case of the appellant, and excludes him from the country, if the Congress of 1888 had the power to exclude him, seems to be conceded, by his learned counsel.

The contention of the counsel of *Chae Chan Ping* involves not only the sovereignty of the United States, but the power of the last or existing Congress over the acts of other and former national legislatures.

Neither the Congress of 1884, nor any other Congress, could divest the United States of any of the attributes of sovereignty. Nor could the Congress of 1884 tie the hands of future Congresses and prevent the repeal or modification of laws as the public good from time to time should seem to require. It would be idle to cite authorities upon these points even could any decision of a point so elementary in its nature be found.

It would be a curious and most illogical adjudication of the law to hold that the alien respondent *Chae Chin Ping* could, in spite of the act of Congress of 1888, land in the United States, in view of the fact, which it is futile to deny, that the same Congress could have passed at the same session an act requiring

him, in common with any or all other aliens, to depart with or without notice or in a time given, or peremptorily, and to have him, as an alien, finally thrust across the frontier and expelled, if necessary. The greater power must surely include the lesser. If he could be sent away after coming, he can be kept out.

The gentlemen on the opposite side evidently appreciate the difficulty and try to avoid it.

In the brief of counsel, on file in this case, the famous "Alien and Sedition Acts" are cited (Act of June 25, 1798, 1 Stat. at Large 570, and July 6, 1798, Stat. at Large, 577, which provided in effect for doing under certain circumstances precisely the thing above suggested. But the "Alien and Sedition" acts are useless so far as we can see from the brief of counsel, except as example of unwise or unpopular laws.

We need scarcely say that this Court will not take notice of the unwisdom or unpopularity of acts of Congress or other legislation provided for under the Constitution of the country. They look merely to the power.

And there is not the slightest doubt that the "Alien and Sedition" acts were strictly within the power of Congress, and so this Court must have held had it ever been called upon to pass upon the questions.

In fact, the power of Congress to deal with aliens substantially as it may consider the public good to demand to expell them from the country, with or

without notice, or to forbid their leaving, if it shall seem best, or to require them to withdraw to some specified part of the country and there remain under surveilance, and to imprison them upon refusal to obey, as was done in that case, was decided and upheld by Judge Washington in Lockington's case, (*Lockington* vs. *Smith*, Pet. C. C., 466,) and is beyond question the law of the land, and the power to do so is an essential attribute to the complete sovereignty of the nation.

True, Lockington's case arose in time of war, and he was held as an alien enemy; but the power of peace and war and all other matters touching our relations with foreign nations as well as matters of commerce between our country and others under which term alien immigration is included are exclusively within the province and control of Congress, and it is the sole judge of all exigencies and necessities of a public nature arising under them. Story on the Constitution, (4th Ed., Cooley), Sects. 1061–1065, 1342.

In both briefs filed in behalf of respondent, but notably in that of Messrs. Hoadly and Carter, an effort is made to show that the Alien and Sedition Acts were unconstitutional.

But, it will be observed, that the authority of the sovereign power wherever it may rest to expel aliens from the country is not questioned. The dispute over the Alien and Sedition acts was as to where the power to expel them was vested, whether in Congress or in the State.

This is a revival of the old contention of State Rights, with the Virginia resolution of 1798, urged as conclusive of the question. No adjudication of this court, or of any court, is cited showing the unconstitutionality of the acts, and it is to be presumed that none can be found. Against the Virginia resolution the learned counsel admits the Massachusetts and New Hampshire resolutions, taking the opposite view, and also a minority report of the Virginia legislature to the same effect. See also Judge Cooley's views, note to Sec. 1294, Story on the Constiution, 4th Ed.

The Virginia politicians of that day did, beyond a doubt, deny the right of Congress to expel aliens, claiming that power for the States, but they, at the same time, and long after, continued to dispute the authority of Congress to do a large number of acts of sovereignty, with which objectionable exercise of power this Court has since agreed, and the questions are settled against the State Right theory.

But if the Alien and Sedition Acts were void, this case is not affected. The question is, Has Congress the power to keep out an alien whose presence is deemed undesirable?

Will counsel claim, in the present condition of the American Nation, and in the light of the events of the last quarter of a century, that aliens, objectionable to the United States at large, and believed to be dangerous to the interests of the entire country, can be protected and domiciled in any particular State by virtue of State laws, in defiance of the will of the Nation expressed through Congress?

If so, we have made but little progress in consoli-

dating the American people into a Nation one and indivisible.

Under the law of nature and nations the right of a man, or body of men, to leave one country and pass into another for any purpose—that other being free and sovereign,—must, in the end, come to be a right represented by force alone, and end in a question of the strongest arm and best guns.

True, that the so-called Right of Expatriation embodied in the Burlingame treaty, has been adopted in the Revised Statutes of the United States, and as to all not exempted from it by later legislation must bind this court in a proper case. But by the acts of 1882 and 1884 all Chinese laborers, save a very limited class, were excluded from the rule, which exclusion this act of Oct. 1, 1888, extended to *Chae Chan Ping*, the appellant, who is thrown back upon the general law of nature and nations, and has no right to come to this country, except by consent of Congress, which he has not obtained, or by invincible force and arms which he does not seem to have.

The Constitution and laws of the United States were adopted for the benefit of the people of the United States. Resident aliens have only such absolute rights as the public law of Nations secures to them, which rights are of imperfect obligation. Non-resident aliens have no rights at all, save what we choose to accord to them.

The questions upon which this cause must turn

have been over and over again passed upon and decided by this court adversely to appellant's contentions. It seems almost superfluous to cite them.

They are arrayed in incontestible force in support of the reasoning of Judge SAWYER before whom the case was heard in California.

It is enough to mention the last one, that of *Whitney* vs. *Robertson*, 124 U. S., 191, which is determinative of the case.

Messrs. Hoadly and Carter, in alluding to *Chew Hong* v. *U. S.*, 112, U. S., 536 (brief p. 18), use this language: "We do not deny the plenary power of Congress over the treaty and over its own legislation so as to forbid the future immigration of Chinese laborers and the future issue of certificates such, as described in the Acts of 1882 and 1884."

Again, on page 16, it is said: "As to the treaty with China, we do not deny the plenary power of Congress at will to abrogate each and every one of its provisions, neither do we dispute the power of Congress to adopt the system which the Chinese themselves have abandoned, of excluding intercourse with foreigners."

But appellant claims that in his case rights have become vested under the treaty which cannot now be denied him.

"We do not claim that Chae Chan Ping has the right to enforce its (the treaty's) stipulations, or to complain of their breach. Our contention is that

being a law of the United States, he took under it rights of which he cannot be deprived by subsequent legislation."

This contention has been so fully answered by the Solicitor General, in his able brief filed herein, that it is unnecessary to deal with the matter in detail. A few words upon the subject may not be out of place in view of the able argument lately filed by appellant.

It might be suggested, at the outset, that this contract, if such it be, has no greater force than the faith pledged by the United States to a pre-emption settler who enters upon surveyed public land intending to improve and make his home there, and whose rights and improvements, the very roof over his head, no matter how valuable, may be taken from him and the land sold or given to another, if the pre-emptioner has not perfected his title before the law is changed by Congress as was done in the Yosemite case. 15 Wallace, 77.

It seems to us from the extracts already quoted from appellant's brief that he cannot consistently claim relief.

We, of course, concede that under a treaty authorizing an alien to acquire property, if he acquire it while such treaty is in force, then the property is his absolutely and beyond the reach of Congressional attack. Such was the case supposed by Justice MILLER in *Edye* vs. *Robertson*, 112 U. S. 580, and in that portion of the opinion recited in appellant's brief, pp. 17 and 18.

But what right did this Chinaman acquire under

these treaties, or the Acts of 1882 and 1884? How much better off was he after those treaties were made, and those acts passed, than before? This Government never commenced to curtail the privilege of immigration as far as Chinamen were concerned until the inauguration of the very legislation upon which this man bases his pretentions. The Act of 1882, restricted the privileges theretofore enjoyed by subjects of the Chinese Empire. The Act of 1884 tended in the same direction, and was progressive, and the Act of 1888 merely completed that which Congress could have done in the first instance and by a single act. Appellant practically admits that he could now be wholly debarred from inhabiting this country if he had never been "restricted." In other words, his position is that, because Congress limited his previously enjoyed privileges, therefore it lost its power to exclude.

Much is said by the learned counsel of the form of the certificate actually given, and that authorized by the acts in controversy. It is urged that these enactments disclose a purpose to *grant* something which it is asserted is nothing less than a franchise, to Chae Chan Ping. But section 4 of the Act of 1884, passed before appellant's departure, declares that the certificate is to be issued for the purpose of properly identifying the laborers referred to, and to furnish the party receiving the certificate with evidence of his right to go from and come to the United States, etc.

The mere use of the word "right" does not signify the grant of anything. As here expressed, it is only referred to a privilege permitted to be enjoyed as

long as the United States continued so minded. Had the intention been, as urged by counsel, we must conclude that a right was conferred to go from the country as well as to enter it. But it is common knowledge that no one has ever said that the Chinaman shall not go. The effort has ever been to exclude him. It has never been hinted that it was necessary to confer a right in order to provide an exit.

If everything which counsel claims was done actually transpired no franchise was granted.

What special privileges were conferred upon Mr. Ping? Absolutely none. On the conrtary, he was restrained day after day and session after session; at one time he might come and go at will without a certificate, then the certificate was made essential, and because Congress, for the time being, saw fit to leave him a portion of the favors which he before enjoyed, he boldly asserts that the failure to take away *all* these privileges was tantamount to a solemn compact, binding in his favor, whereby Congress covenanted to never withdraw that which it might have withheld in the first instance.

We cannot think that appellant is consistent in conceding (Brief, p. 17) that no contract was made, and, afterwards (Brief, p. 36) insisting that there had been an actual grant.

However this may be, we can perceive none of the elements of a contract here. To begin with, Congress cannot cede away its power or avoid its duty to exclude aliens whose presence is obnoxious to the State. The right to decide upon this subject is vested in Congress, and however vigorously ap-

pellant or his counsel may protest against the decision rendered, they have not the power, nor has the court the power, to question the correctness of the conclusion. The views of Judge Sawyer upon this topic are certainly satisfactory to all fair minds. (36 Fed. Rep., 437.)

But we have shown that Congress never attempted to confer any special privileges or rights upon appellant. The latter desiring to take a trip to China, obtained a certificate containing his description. He went home, presumably visited his friends, transacted his business, and started back to the United States. Before the completion of his journey, the same Government which had previously said to him that he might, as that power then felt disposed, return, declared that he could not come; and because of the policy of the United States at the time the certificate was given, and because such certificate, which was nothing more than a photograph, was issued to prevent the perpetration of a fraud on the part of Ping, it is declared that there is a perfect case of an executed contract.

Counsel noticed the difficulty to be met in making a contract out of the treaties, the statutes and the certificate, and hence a large number of authorities are cited to establish that damage to the promisee, constitutes as good a consideration as benefit to the promisor. (Brief, pp. 21–28.)

We do not dispute these elementary propositions, but have not ascertained their relevancy. Appellant explains (brief, p. 20,) that if there was no contractual relation nevertheless, that because Ping embarked there became "vested in him an executed franchise or right to return."

This record discloses that the so-called franchise or right to return, has never been executed, but that appellant is endeavoring to execute it, *i. e.*, to return in defiance of the law of Congress.

Counsel, appreciating the embarrassments of the situation, endeavor to locate the consideration for the supposed contract (Brief, p. 25), and declare that appellant's "departure" constituted a consideration. "The sacrifice involved in his departure, the detriment suffered by him." We are further told that the United States invited him to go and he went, trusting that he might get back. Will some one tell us how it can be considered a "detriment" to go home, whether on business or pleasure? Is the acceptance of an invitation to leave this country, coupled with a statement that the party leaving may return sufficient to deprive us of the power of excluding the alien who accepted the invitation, and whose presence we now deem contrary to the people's welfare?

Clearly, the certificate was never issued upon any such theory. It was issued, because the bad character of Ping's countrymen made it necessary to provide a moderately certain means of identification.

We do not deem it necessary to discuss at length the question as to whether the act of 1888, as applicable to appellant, is an *ex post facto* law. No attempt is made to impose a punishment for an act not punishable at the time it was done. No pain or penalty is prescribed for any act antecedently committed. Ping was ordered not to return. After this order he attempted to land. If he finds it uncomfortable on the "Belgic," it is not because Congress had not previously legislated against him. The fact that

he had already started can make no difference. Before he reached America, this Government warned him off. That he did not hear or heed the warning is immaterial. Had he been permitted to land, and had an act been passed making it a crime for him to do that which was innocent when he did it, the case might be different.

We can understand that it would be "punishment" to prevent a citizen coming home to his country; expatriation has always been deemed an infliction, but we have never heard that it is as a matter of law, punishment to exclude an alien from a nation whose people do not desire his presence.

The point that appellant is deprived of his property without due process of law, and that he does not receive the equal protection of the law, is certainly not well taken. No one is attempting to get any of Ping's property, in fact, it is not shown that he has any estate; and as to his liberty, all that this country asks of him is to roam without its confines. He cannot come into this Republic, to that extent only are "the bounds of his habitation fixed;" and this very power the learned counsel admit the United States possesses.

It is inaccurate to say that appellant has been banished, he left voluntarily. It would be equally correct to declare that Chinese laborers, who were never outside of China, had been banished by Congress because the privilege of coming here has been denied them.

We will not follow the example of counsel, and comment upon the policy of this legislation. We do not deem an argument of that kind legitimate here. Years of experience have evolved this legislation;

men of wisdom have enacted it, and necessities urgent as those of war demanded it. We trust that when counsel again advert to scripture to support their case, they will not forget to mention that the authority quoted to the effect that all nations are of one blood, and are to dwell on the face of the earth, has likewise recognized the propriety of limiting their habitations. We opine that the "unalloyed satisfaction" which would follow a reversal of this case would be more restricted than counsel imagine.

Respectfully submitted,

JOHN F. SWIFT,
and STEPHEN M. WHITE,
*Of Counsel.*

G. A. JOHNSON,
*Attorney General, Cal.*

IN THE

# Supreme Court of the United States.

CHAE CHAN PING, Appellant,
*vs.*
THE UNITED STATES. } No. 1446.

**Appeal from the Circuit Court of the United States for the Northern District of California.**

*Brief by Counsel Appointed by the State of California in Support of the Contention of the United States.*

For a statement of the facts in this case we beg to refer to the very able brief of the Solicitor-General of the United States, Hon. G. A. Jenks, and proceed at once to the argument.

That subsequent legislation may municipally abrogate a treaty is not an open question, and in support thereof we cite the following cases:

Cherokee Tobacco, 11 Wall., 616.
Taylor *v.* Morton, 2 Curtis, 454.
Ropes *v.* Clinch, 8 Blatch., 304.
*In re* Ah Lung, 18 Fed. Rep., 28, 9 Sawyer, 307.
Whitney *v.* Robertson, 124 U. S., 190.
Head Money Cases, 112 U. S., 580.
United States *v.* McBratney, 104 U. S., 621.
Bartram *v.* Robertson, 15 Fed. Rep., 212.
Kent, 1st Vol., Marg., p. 287.

To the same effect are Storey and Cooley.

Indeed, the counsel for appellant, in the brief filed in this case on the 27th ult., concede—

1st. That Congress has the power to abrogate a treaty between the United States and a foreign power.

2d. That the Exclusion Act of October 1st, 1888, was intended to abrogate and does abrogate prior treaties with China, so far as Chinese laborers are concerned; but it is insisted that certain valuable or vested rights have been acquired of which Chinese laborers cannot be deprived by legislation.

We respectfully claim that these so-called rights are not contracts, and are not obnoxious to the constitutional provision in respect to the impairment of the obligation of contracts, but are mere privileges, matters of favor, incentives to hope and expectation, and are not of a nature to be enforced in a court of justice.

Accordingly, Mr. Justice Daniel, in delivering the opinion in the case of Butler *et al. v.* Pennsylvania, 10 Howard, 416, says:

"The contracts designed to be protected by the tenth section of the first article of that instrument (the Federal Constitution) are contracts by which perfect rights, certain definite, fixed, private rights of property, are vested. *They are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or State government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require.*"

This same distinction between perfect rights and mere privileges is drawn in the case of United States *v.* Benzon, 2 Clifford, 513. Referring to the provision of an act of Congress, and the change afterwards made, the court said:

"The exact language of the provision is, that all goods which may be in the public stores or bonded warehouse, on the day mentioned, may be withdrawn for consumption upon payment of the duties now imposed thereon by law, provided the same shall be so withdrawn within three months from the date of the original importation. The change complained of is, that the period allowed for the withdrawal is limited to three months from the date of the original importation, instead of three months from the time the goods were deposited. Such changes, however, have frequently been made in the different provisions upon the subject, and unless it be assumed that warehousing imported goods is *a right, and not merely a privilege*, which may be granted or withheld, it is difficult to see on what ground the importer has any right to complain."

This distinction is still more forcibly drawn in the case of Burroughs *v.* Peyton, 16 Grattan, 470, in an able opinion written by Mr. Justice Robertson. The question involved was whether a person who had put in a substitute under an act then in force, had been regularly discharged from the service, and whose substitute was still in the service, was liable to conscription under a subsequent act of Congress. The court passed upon the constitutional power to enact this subsequent act, which was entitled "An act to put an end to the exemption of those who have heretofore furnished substitutes."

There was the same provision as in the Federal Constitution imposing a restriction against impairing the obligation of a contract. And the court held that, even if the privilege of substitution had been granted upon a valuable consideration paid directly to the Government, Congress would still have a right to put an end to the exemption granted by reason of it, whenever, in their judgment, the situation of the country became such as to render it proper that the party should be again required to serve in the army, and that the Government of no nation can abdicate, or bind itself not to exercise

any part of the power entrusted to it for the defense of the community. Says the court:

"No Government can have the right to endanger the life of the nation it represents by contracting that it will not exercise the powers confided to it. For a proposition so obviously true it can hardly be necessary to cite authority, but the authorities are ample to show that in less important matters than that of military defense, a legislative body cannot part with its powers by any proceeding so as not to be able to continue the exercise of them, and if any attempt be made so to do, the act is null and void. It can and should exercise them again and again, as often as the public interests require. It cannot abridge its own legislative power by making permanent and irrepealable contracts in reference to matters of public interest."

The court says further:

"Exemption from future liability on the part of a citizen to render military service at the call of the country is not a subject-matter of contract within the meaning of the clause of the Constitution prohibiting the passage of any law impairing the obligation of contracts. By the term 'contracts' in that clause it is *not meant to include rights and interests growing out of measures of public policy.* Acts in reference to such measures are to be regarded as rather in the nature of legislation than of compact, and although rights or interests may have been acquired under them, those rights and interests cannot be considered as violated by subsequent legislative changes which may destroy them. Whatever in the nature of a contract could be considered to exist, there must be implied in it a condition that the power is reserved to the legislature to change the law thereafter *as the public interests may from time to time seem to require.*"

The court held that the substitution was an act of grace and favor on the part of the Government, and not as a matter of contract; that it was a mere privilege accorded.

The court says further:

"A plain distinction exists between statutes *which create hopes and expectations* and those which *form contracts.* Congress allowed exemption from military service to those who furnished substitutes on existing considerations of policy, without annexing restraints on their will or abdicating their prerogative, and consequently, are free to modify, alter, or repeal them. Whatever, therefore, may have been the expectation at the time, in reference to the extent of the exemption obtained by putting in a substitute, there was clearly no contract the obligation of which has been impaired, and no vested right which has been violated by the passage of the law putting 'an end to the exemption from military service of those who have heretofore furnished substitutes.' "

The idea of the treaty of 1880 and the acts to enforce it was to diminish the freedom of Chinese laborers in coming hither, and not to obtain any benefit or valuable consideration from them. It was simply a contract between independent sovereignties.

So in the case of Taylor *v.* Morton, *supra*, Mr. Justice Curtis held at the circuit—

"That whether a treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation had been voluntarily withdrawn by one party so that it was no longer obligatory on the other; *whether the views and acts of a foreign sovereign had given just occasion to the legislative department of one Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise, were not judicial questions.*"

*In re* Ah Lung, 9 Sawyer, 307, Mr. Justice Field, delivering the opinion, says:

"The immigration of foreigners to the United States, and the conditions upon which they shall be permitted to remain, are appropriate subjects of legislation as well as of treaty stipulation. No treaty can deprive Congress of its power in that respect."

That a Government cannot abdicate or surrender its sovereignty, so forcibly argued by Judge Robertson, was announced at an early day by Chief Justice Marshall in case of The Schooner Exchange *v.* McFadden and others. (7 Cranch., 136, 137.)

Says the court:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

"This full and absolute territorial jurisdiction being alike the attribute of every sovereign, *and being incapable of conferring extra-territorial power*, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect answerable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only *under an express license or in the confidence* that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

Treaties are not rules for the conduct of subjects, but contracts by which nations agree to regulate their own conduct. Although a treaty may be infracted as a municipal rule, it may be pending internationally, and enforced by reclamation, retaliation, or reprisal to the extent of appealing to what should be the dernier resort of nations—war itself.

The inhibition against impairing the obligation of a contract is only against the States, and not against the Federal Government, and, moreover, there is no contract between the United States and individual Chinese laborers at all. The power is granted to Congress to regulate commerce with foreign nations, and if, in the exercise of this granted power, a law should be passed impairing the obligation of a contract, we contend that such a law would be valid and cannot be set aside by the courts, although it is not necessary to go so far for the purposes of this case. And it was held in Whitney *v.* Robertson, *supra*, that a stipulation in a treaty that no higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominion of the treaty-making power than are or shall be payable on the like articles being the produce or manufacture of any foreign country, does not preclude Congress from passing an act exempting from duty like products and manufactures imported from any particular foreign dominion it may so favor.

Secondly, it is claimed that the Exclusion Act is in contravention of the Fifth Amendment to the Federal Constitution in this, that it deprives appellant of both liberty and property without due process of law.

This is not a case of a Chinaman born on American soil. It is the case of an alien who has voluntarily left the country. As was said by the distinguished judge of the circuit, "the being here, with a right of remaining is one thing, but voluntarily going away, with a right, *at the time*, to return, is quite another."

In what respect is the inhibition against his returning not due process of law? Says Kent, vol. 1, p. 35, cited by the Solicitor General:

"If, however, any Government deems the introduction of foreigners, or their merchandise, injurious to

the interests of their own people, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the Government which tolerates it."

If a right to due process of law can be affirmed of an alien under such circumstances, the inhibition by Congress against his re-entering the United States constitutes due process. The reasons influencing the legislative mind may have been various. They may have embraced the preservation of the autonomy of the country, the prevention of any heathen admixture with a Christian civilization, the warding off of corrupt and deteriorating practices, the preservation of the public health and morals, the riddance of the country of a pauper element and the advancement of the general well-being. Whether the reasons were good or not is not a matter of review; the power still remains, and the legislative decision is final. Any other position would extend the doctrine of extraterritoriality beyond all bounds, and convert a free and independent country with a mere appanage of a foreign power and effete civilization. The action of Congress is merely in the line of the administration of *preventive justice.* No property rights are thereby interfered with; and hence the remarks of the distinguished jurist who delivered the opinion in the Head Money Cases do not apply—that "a treaty may also contain certain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations—*in regard to rights of*

*property by descent or inheritance where the individuals concerned are aliens.*"

Here there are no rights of property by descent or inheritance involved. The legislation is simply in furtherance of the public good and the public interests. There are none of those perfect rights—certain definite, fixed private rights of property—spoken of by Mr. Justice Daniel. The rights, such as they are, are rights of imperfect obligation.

Thirdly, it is claimed that the Exclusion Act is in contravention of that part of the Constitution of the United States which provides that no bill of attainder, or *ex post facto* law, shall be passed.

The foundation of either is that some crime has been committed. But the departure of the Chinaman who has a return certificate is not made an offense, and there is no punishment or penalty in providing that he shall not return. His departure is purely voluntary. If he remains here he has all the privileges and immunities accorded to other Chinamen who remain, but it does not follow, if he voluntarily goes away, with a right at the time to return, that he shall have the same rights as resident Chinamen. It is a political question which Congress has the right to settle, in spite of any treaty, whether or not it is to the best interest of the country that he should return, and their solution of that question is conclusive, although their reasons for their action may be fallacious.

The Exclusion Act is not an *ex post facto law.* "By an *ex post facto law* is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required."

It was the law of the land that he should not return at the time he sought to do so. His act was subsequent to the law. He was bound to know the law, and it was his duty to comply with it. It is not apparent how, under such circumstances, the exclusion act was an *ex post facto law* or bill of attainder, as to him who was an alien, and who, previous to its passage, had left the country. If the act of returning had been before the passage of the law, and the law afterwards provided a punishment or penalty for his act, that would be *ex post facto*, and would be converting an act innocent when done into a criminal offense enforced by penal sanctions.

We respectfully submit that the judgment should be affirmed.

G. A. JOHNSON,
*Att'y-General of California.*

STEPHEN M. WHITE.
JOHN F. SWIFT.

FEB 10 1888
JAMES H. McKENNEY
CLERK

# In the Supreme Court of the United States.

OCTOBER TERM, 1888.

CHAE CHAN PING, APPELLANT,
vs.
THE UNITED STATES.
No. 1446.

*APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.*

## BRIEF FOR THE UNITED STATES.

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## BRIEF FOR THE UNITED STATES.

### STATEMENT OF FACTS.

The petitioner is a Chinese laborer. He came to the United States in 1875. On the 2d of June, 1887, he obtained a certificate in accordance with the provisions of the fourth section of the act of 1882, as amended by the act of 1884, and went to China. On the 7th of September, 1888, he sailed from China to return to the United

States, and arrived at San Francisco on the 7th of October, 1888. On the 1st of October, 1888, an act of Congress was passed which rendered his certificate void and forbade his admission. He had no notice of the passage of the act until he arrived at San Francisco. He claimed admission. The collector of the port refused to permit him to land. He presented his petition for *habeas corpus* to the circuit court of the United States for the northern district of California (Rec., pp. 7, 8, and 9). The case having been heard, on the 15th of October, 1888, the court remanded him to the custody of the master of the ship whence he was taken. The same day an appeal was taken by the petitioner to this court. (Rec., p. 16.)

## BRIEF OF ARGUMENT.

### I.

*The treaty and statutes.*

By the first article of the treaty between the United States and China, published on the 5th day of October, 1881 (22 U. S. Stats., 826; Appendix, Exhibit A), it is provided:

> Whenever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it.

The second article provides:

> Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

On the 6th day of May, 1882, Congress passed an act to execute the stipulations of the treaty (22 U. S. Stats., 58; Appendix, Exhibit B). Its fourth and fifth sections provide for the issue of certificates of identification to Chinese laborers who were resident in the United States prior to the making of the treaty. Under this act, the court received oral and other evidence of identification, and of prior residence.

On the 5th day of July, 1884 (23 U. S. Stats., 115; Appendix, Exhibit C), Congress amended the act of 1882, and by the amendment to the fourth section provided that the certificate of identification therein required "should be the only evidence" permissible to establish the right of re-entry.

On the 1st day of October, 1888 (U. S. Stats., of 1888, 504; Appendix, Exhibit D), an act was passed which provides:

> CHAP. 1064. An act a supplement to an act entitled "An act to execute certain treaty stipulations relating to Chinese," approved the sixth day of May, eighteen hundred and eighty-two.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, it shall be unlawful for any Chinese laborer who

shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.

SEC. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

SEC. 3. That all the duties prescribed, liabilities, penalties, and forfeitures imposed, and the powers conferred by the second, tenth, eleventh, and twelfth sections of the act to which this a supplement are hereby extended and made applicable to the provisions of this act.

SEC. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed.

Approved October 1, 1888.

This act makes no exception in favor of any person on the high seas, nor of any other, but forbids the return of any Chinese laborer who is not within the United States at the date of its passage. Its language is so clear and unequivocal that, if Congress had the power to enact the law, the complainant in this case had no right to be admitted into the United States, and the decree of the court should be affirmed.

## II.

## CONGRESS HAD POWER TO ENACT THE LAW.

### A.

*Congress has the constitutional power to exclude foreigners.*

Full legislative powers, in the United States, are committed to Congress. In it the powers are vested to provide for the common defense and general welfare; to establish uniform rules of naturalization; to regulate commerce with foreign nations; to declare war; to make all laws for the execution of all the powers vested by the Constitution in the Government, or in any Department or officer thereof. The power is vested in the Executive to make treaties, appoint ambassadors, ministers, and consuls. The exercise of these powers is forbidden to the States. The whole tenor of the Constitution is that the United States is a nation, and, as to foreign nations and their subjects, is endowed with full sovereign powers.

The ninth section of the first article of the Constitution provides:

> The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The implication from this, is clear, that after the year 1808 Congress might prohibit the migration or importation of foreigners. As a nation the Government may exercise international powers.

## B.

*The law of nations.*

International law fully establishes the right of a nation to exclude foreigners from its domain.

In the case of *Schooner Exchange* vs. *M'Fadden* (7 Cranch, 136) Chief-Justice Marshall declared:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the nation itself. They can come from no other legitimate source.

The principle is thus stated in Vattell's Law of Nations, page 171:

> Since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has no doubt, a power to annex what conditions he pleases to the permission to enter. This, as we have already said, is a consequence of the right of domain. Can it be necessary to add that the owner of the territory ought, in this instance, to respect the duties of humanity? The case is the same with all rights whatever: the proprietor may use them at his discretion; and, in so doing, he does not injure any person. But if he would be free from guilt and keep his conscience pure he will never use them but in such manner as is conformable to his duty. * * * * *

There are States, such as China and Japan, into which all foreigners are forbid to penetrate without an express permission.

In Kent's Commentaries, vol. 1, page 35, it is stated:

> If, however, any Government deems the introduction of foreigners, or their merchandise, injurious to the interest of their own people, they are at liberty to withhold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the Government which tolerates it.

In a foot-note on the same page, after suggesting the views of another author, it is added:

> But I am of opinion, notwithstanding, that every Government has the right, and is bound in duty, to judge for itself how far the unlimited power of emigration, and of the admission and residence of strangers and emigrants, may be consistent with its own local interests, institutions, and safety.

## C.

*Congress has the power to repeal the treaty.*

The act of 1888 is inconsistent with the second article of the treaty with China. By the second clause of the sixth article of the Constitution it is thus provided:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.

By this, laws and treaties are placed in the same category, and as a whole they constitute the laws of the land.

As such, treaties are subject to repeal by the power of Congress. The right to repeal a treaty was asserted and exercised by Congress as early as the 7th of July, 1798 (1 U. S. Stats., 578), by an act which repealed the treaties with France, as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention, heretofore concluded between the United States and France, and that the same shall not henceforth be regarded aslegally obligatory on the Government or citizens of the United States.

The power is fully established by judicial decisions. In the *Head Money Cases* (112 U. S., 598) Mr. Justice Miller delivering the opinion of this court, after citing the *Cherokee Tobacco* (11 Wall., 616); *Taylor* vs. *Morton* (2 Curtis, 454); *Ah Lung* (18 Fed. Rep., 28); *Clinton Bridge Case* (Woolworth, 150, 156); *Ropes* vs. *Clinch* (8 Blatchf., 304); *Bartram* vs. *Robertson* (15 Fed. Rep., 212), which ruled Congress has the power to modify or repeal a treaty, says:

> It is very difficult to understand how any different doctrine can be sustained.
>
> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the Governments which are parties to it. If these fail its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.

It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.

But even in this aspect of the case there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date. Nor is there anything in its essential character, or in the branches of the Government by which the treaty is made, which gives it this superior sanctity.

* * * * *

> In short, we are of opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.

In the case of *Whitney* vs. *Robertson* (124 U. S., 194, 195), Mr. Justice Field, delivering the opinion of the court, ruled:

> By the Constitution a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing.

In discussing the opinion of Justice Curtis in the case of *Taylor* vs. *Morton*, *supra*, he further says:

> He justly observed as a necessary consequence of these views that if the power to determine these matters is vested in Congress, it is wholly immaterial to inquire whether by the act assailed it has departed from the treaty or not, or whether such departure was by accident or design, and if the latter, whether the reasons were good or bad.
>
> In these views we fully concur. It follows, therefore, that when a law is clear in its provisions, its validity can not be assailed before the courts for want of conformity to stipulations of a previous treaty not

already executed. Considerations of that character belong to another department of the Government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will.

## III.

*No legal right of the petitioner was violated by the act of* 1888.

As has been shown, the petitioner's residence in the United States was only by indulgence of the Government. It was by permission only. The withdrawal of that permission violated no personal right. He had no right under the second article of the treaty, for that article, so far as it was inconsistent with the act of 1888, was repealed.

He had no contract right to return. He departed freely, without any agreement with the United States as to a right to return. On his departure the Government relinquished to him none of its sovereign power, to repeal its laws, nor did it give him any pledge that it would adhere in the future to any policy then existing. That he expected to return did not entitle him to do so, if, after his departure, the Government changed its policy and forbade him admission. He obtained his certificate of identification in accordance with the act of 1882, as amended by the act of 1884, but that certificate was only evidence of his residence here prior to the time of his departure.

The amendment of 1884 made the certificate the only evidence; but the facts to be established by that evidence at the time of his return were wholly immaterial, for whether he resided in the United States before or when

he departed therefrom gave him no right, under the act of 1888, to admission. That evidence neither gave him the right to admission, if established, nor constituted a single link in a chain of evidence to establish such right. When the privilege to return or remain was absolutely withdrawn, without exception on any state of facts, it was of no avail to prove that he had been here before or when he left.

That he had no notice of the passage of the law until he reached San Francisco did not entitle him to admission, for the laws of a nation, to be effective, are not required to be specially prescribed or published to foreign nations or foreign citizens. They are rather presumed not to be known, because in courts of justice foreign laws have to be proven, as any other facts. If want of actual notice entitled all Chinese to admission who were not notified the law would be a practical nullity.

That it was physically impossible that this appellant should know only renders certain an immaterial fact; for whether he knew or did not know, it was the law of the land. From the 1st of October, 1888, the law was of binding legal force. His ignorance could not render the law void as to him nor as to any person else.

The constructive notice of the promulgation of the law gives rise to a "presumption of law," which is conclusive, that all interested in its observance know it. This principle is so essential to the nature of law that no individual cases of alleged hardship will justify its disregard. If Congress believed that any unnecessary injury would be done to those who at the time of the passage of the act had embarked for the United States, an exception in their

favor should have been incorporated in the act; but in the absence of such an exception it is not within the province of the judiciary to make it.

The law is not retroactive, for it takes effect only from its passage, and entails no evil consequences for or on account of prior residence. It only withdraws in the future an indulgence which the Government had before during its pleasure extended to this foreigner.

It is still less an *ex post facto* law, for such a law is only one

> Which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required. (*Cummings* vs. *State of Missouri*, 4 Wall., 325, 326.)

The act of 1888, even if it might be assumed to be a criminal penal statute—which it is not—does certainly not impose any punishment on the Chinese laborers generally who did not violate the law. The law is not violated by a departure from the United States. It is not, in any view, intended to restrict departure. If any act under the law is made a crime—which is denied—it is the return or entry into the United States. The law does not operate upon past entries, but only those which occur after its passage. It only forbids the admission of Chinese laborers, but not as a punishment for a crime. It no more forbids the entry of Chae Chan Ping than it does the entry of any other Chinese laborer who was not in the United States at the time of its passage. It does not as-

sume that he, or any other citizen of China, has committed any crime, nor forbid entry on any such account. It is simply an act to exclude a given class of foreigners from the domain of the United States whom, in the rightful exercise of its discretion, the Government declines to tolerate as residents.

If Chae Chan Ping claims he has exceptional privileges, which other Chinese laborers have not, who had not been residents of the United States before the passage of the act, the reply is that he held his exceptional privileges only by virtue of the laws which *then* existed, but which have since been repealed; and as there is no law extending to him those privileges, the privileges died with the law. The law gave him the privilege, and the repeal of the law has taken it away; and he has no rights greater than any other non-resident of the same class.

G. A. JENKS,
*Solicitor-General.*

# APPENDIX.

## EXHIBIT A.

**Treaty between the United States and China concerning immigration. Concluded November 17, 1880. Ratification advised by the Senate May 5, 1881. Ratified by the President May 9, 1881. Ratifications exchanged July 19, 1881. Proclaimed October 5, 1881.**

*By the President of the United States of America.*

A PROCLAMATION.

Whereas a treaty between the United States of America and China for the modification of the existing treaties between the two countries by providing for the future regulation of Chinese immigration into the United States, was concluded and signed at Peking, in the English and Chinese languages, on the seventeenth day of November, in the year of our Lord one thousand eight hundred and eighty, the original of the English text of which treaty is word for word as follows:

Whereas, in the eighth year of Hsien Feng, Anno Domini 1858, a treaty of peace and friendship was concluded between the United States of America and China, and to which were added, in the seventh year of Tung Chih, Anno Domini 1868, certain supplementary articles to the advantage of both parties, which supplementary articles were to be perpetually observed and obeyed; and

Whereas the Government of the United States, because of the constantly increasing immigration of Chinese labor-

ers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing treaties which shall not be in direct contravention of their spirit:

Now, therefore, the President of the United States of America has appointed James B. Angell, of Michigan, John F. Swift, of California, and William Henry Trescot, of South Carolina, as his Commissioners Plenipotentiary; and His Imperial Majesty the Emperor of China has appointed Pao Chun, a member of His Imperial Majesty's Privy Council, and Superintendent of the Board of Civil Office; and Li Hungtsao, a member of His Imperial Majesty's Privy Council, as his Commissioners Plenipotentiary; and the said Commissioners Plenipotentiary, having conjointly examined their full powers, and having discussed the points of possible modification in existing Treaties, have agreed upon the following articles in modification:

ARTICLE I.

Whenever in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

ARTICLE II.

Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions, which are accorded to the citizens and subjects of the most favored nation.

ARTICLE III.

If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.

ARTICLE IV.

The high contracting Powers having agreed upon the foregoing articles, whenever the Government of the United States shall adopt legislative measures in accordance therewith, such measures will be communicated to the Government of China. If the measures as enacted are found to work hardship upon the subjects of China, the Chinese Minister at Washington may bring the matter to the notice of the Secretary of State of the United States, who will consider the subject with him, and the Chinese Foreign Office may also bring the matter to the notice of the United States Minister at Peking and consider the subject with him, to the end that mutual and unqualified benefit may result.

In faith whereof the respective Plenipotentiaries have signed and sealed the foregoing at Peking, in English and Chinese, being three originals of each text of even tenor and date, the ratifications of which shall be exchanged at Peking within one year from date of its execution.

Done at Peking, this seventeenth day of November, in the year of our Lord 1880; Kuanghsii, sixth year, tenth moon, fifteenth day.

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| JAMES B. ANGELL. | [SEAL.] |
| JOHN F. SWIFT. | [SEAL.] |
| WM. HENRY TRESCOT. | [SEAL.] |
| PAO CHUN. | [SEAL.] |
| LI HUNGTSAO. | [SEAL.] |

And whereas the said treaty has been duly ratified on both parts, and the respective ratifications were exchanged at Peking on the 19th day of July, 1881:

Now, therefore, be it known that I, Chester A. Arthur, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in Washington this fifth day of October, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[SEAL.] CHESTER A. ARTHUR.

By the President:

JAMES G. BLAINE,
*Secretary of State.*

## EXHIBIT B.

CHAP. 126. An act to execute certain treaty stipulations relating to Chinese.

Whereas, in the opinion of the Government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore,

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or having so come after the expiration of said ninety days, to remain within the United States.

SEC. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may be also imprisoned for a term not exceeding one year.

SEC. 3. That the two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned; nor

shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place; *Provided*, That all Chinese laborers brought on such vessel shall depart with the vessel on leaving port.

SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of this act, and in order to furnish them with the proper evidence of their right to go from and come to the United States of their free will and accord, as provided by the treaty between the United States and China dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books to be kept for that purpose, in which shall be stated the name, age, occupation, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house; and every such Chinese laborer so departing from the United States shall be entitled to and shall receive, free of any charge or cost, upon application therefor, from the collector or his deputy, at the time such list is taken, a certificate signed by the collector or his deputy and attested by his seal of office in such form as the Secretary of the Treasury shall pre-

scribe, which certificate shall contain a statement of the name, age, occupation, last place of residence, personal description, and facts of identification of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure he shall deliver his certificate to the master of the vessel, and if such Chinese laborer shall fail to return to such vessel before her departure from port the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter; and upon delivery of such certificate by such Chinese laborer to the collector of customs at the time of re-entry in the United States, said collector shall cause the same to be filed in the custom-house and duly canceled.

SEC. 5. That any Chinese laborer mentioned in section four of this act being in the United States, and desiring to depart from the United States by land, shall have the right to demand and receive, free of charge or cost, a certificate of identification similar to that provided for in section four of this act to be issued to such Chinese laborers as may desire to leave the United States by water; and it is hereby made the duty of the collector of customs of the district next adjoining the foreign country to which said Chinese laborer desires to go to issue such certificate, free of charge or cost, upon application by such Chinese laborer, and to enter the same upon registry-books to be kept by him for the purpose, as provided for in section four of this act.

SEC. 6. That in order to the faithful execution of articles one and two of the treaty in this act before mentioned every Chinese person other than a laborer who may

be entitled by said treaty and this act to come within the United States, and who shall be about to come to the United States, shall be identified as so entitled by the Chinese Government in each case, such identity to be evidenced by a certificate issued under the authority of said Government, which certificate shall be in the English language or (if not in the English language) accompanied by a translation into English, stating such right to come, and which certificate shall state the name, title, or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, and place of residence in China of the person to whom the certificate is issued, and that such person is entitled conformably to the treaty in this act mentioned to come within the United States. Such certificate shall be prima-facie evidence of the fact set forth therein, and shall be produced to the collector of customs, or his deputy, of the port in the district in the United States at which the person named therein shall arrive.

SEC. 7. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge any such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and imprisoned in a penitentiary for a term of not more than five years.

SEC. 8. That the master of any vessel arriving in the United States from any foreign port or place shall, at the same time he delivers a manifest of the cargo, and if there be no cargo then at the time of making a report of the entry of the vessel pursuant to law, in addition to the other matter required to be reported, and before landing, or permitting to land, any Chinese passengers, deliver and report to the collector of customs of the district in which such vessel shall have arrived a separate list of all Chi-

nese passengers taken on board his vessel at any foreign port or place, and all such passengers on board the vessel at that time. Such list shall show the names of such passengers (and if accredited officers of the Chinese Government traveling on the business of that Government, or their servants, with a note of such facts) and the names and other particulars, as shown by their respective certificates; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo. Any willful refusal or neglect of any such master to comply with the provisions of this section shall incur the same penalties and forfeiture as are provided for a refusal or neglect to report and deliver a manifest of the cargo.

SEC. 9. That before any Chinese passengers are landed from any such vessel the collector or his deputy shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law.

SEC. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found.

SEC. 11. That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall knowingly aid or abet the same, or aid or abet the landing in the United States from any vessel of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor and shall, on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year.

SEC. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the

proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, by direction of the President of the United States, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States.

SEC. 13. That this act shall not apply to diplomatic and other officers of the Chinese Government traveling upon the business of that Government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons.

SEC. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

SEC. 15. That the words "Chinese laborers," wherever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

Approved, May 6, 1882.

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## EXHIBIT C.

CHAP. 220. An act to amend an act entitled "An act to execute certain treaty stipulations relating to Chinese, approved May sixth, eighteen hundred and eighty-two."

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Section four of said act is hereby amended so as to read as follows:

"SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on the

seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, and in order to furnish them with the proper evidence of their right to go from and come to the United States as provided by the said act and the treaty between the United States and China, dated November seventeenth, eighteen hundred and eighty, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books, to be kept for that purpose, in which shall be stated the individual, family, and tribal name in full; the age, occupation, when and where followed, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house; and every such Chinese laborer so departing from the United States shall be entitled to and shall receive, free of any charge or cost upon application therefor, from the collector or his deputy, in the name of said collector and attested by said collector's seal of office, at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the individual, family and tribal name in full, age, occupation, when and where followed, of the Chinese laborer to whom the certificate is issued corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure, he shall deliver his certificate to the master of the vessel; and if such Chinese laborer shall

fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter, and such certificate shall be the only evidence permissible to establish his right of re-entry; and upon delivering of such certificate by such Chinese laborer to the collector of customs at the time of re-entry in the United States said collector shall cause the same to be filed in the custom-house and duly canceled."

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## EXHIBIT D.

CHAP. 1064. An act a supplement to an act entitled "An act to execute certain treaty stipulations relating to Chinese," approved the sixth day of May, eighteen hundred and eighty-two.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passage of this act it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed or shall depart therefrom and shall not have returned before the passage of this act, to return to or remain in the United States.

SEC. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

SEC. 3. That all the duties prescribed, liabilities, penalties, and forfeitures imposed, and the powers conferred by the second, tenth, eleventh, and twelfth sections of the act to which this is a supplement are hereby extended and made applicable to the provisions of this act.

SEC. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed.

Approved, October 1, 1888.

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